

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH
3 The Estate of JESSE D.)
 WILLIAMS, Deceased, by and)
4 through MAYOLA WILLIAMS,)
 Personal Representative,) Volume 5-B
5)
 Plaintiff,)
6)
 vs.) No. 9705-03957
7)
 PHILIP MORRIS INCORPORATED,) Afternoon Session
8)
 Defendant.)
9
10 TRANSCRIPT OF PROCEEDINGS
11 BE IT REMEMBERED that the above-entitled
12 Court and cause came on regularly for hearing
13 before the Honorable Anna J. Brown on Friday, the
14 26th day of February, 1999, at the Multnomah County
15 Courthouse, Portland, Oregon.
16 APPEARANCES
17
18 Raymond Thomas, James Coon,
 William Gaylord and Charles Tauman,
 Attorneys at Law,
19 Appearing on behalf of the Plaintiff;
20 James Dumas, Billy Randles, Walt Cofer
 and Pat Sirridge,
21 Attorneys at Law,
 Appearing on behalf of the Defendant.
22
23 KATIE BRADFORD, CSR 90-0148
 Official Court Reporter
24 226 Multnomah County Courthouse
 Portland, Oregon 97204
25 (503) 248-3549

(Friday, February 26, 1999, 1:35 p.m.)

P R O C E E D I N G S

Afternoon Session

(Whereupon, the following
proceedings were held in
open court, out of the
presence of the jury:)

THE COURT: All right. I would like to
into on the record to take up a request from The
Oregonian. I understand that we have staff
photographer, Steve Nehl, N-e-h-l, in court.
And I have a letter from Randy Rassmusen (ph),
Deputy Photo Director at The Oregonian.

It reads, "Please accept this letter as
request for public access coverage in the trial
of Williams versus Philip Morris, Inc., in the
courtroom of Judge Anna Brown. We would like to
take still photographs during the court
proceedings as provided for in Uniform Trial
Court Rule 3.180."

Mr. Nehl, I am refreshing my memory on
the provisions of the rules as they apply to
still cameras. I have not had experience were a
still photographer in the courtroom during
proceedings. I have used video cameras.

1 So maybe you can first tell me whether
2 you have had that experience; and, if so, what
3 approach you would take in order to comply with
4 the rule.

5 MR. NEHL: Basically, I have done quite a
6 bit of court photography. I would standing
7 probably back here. The rules are that no jury
8 photographs are to be taken, and just be
9 photographing the court proceedings, individuals
10 during the court proceeding from the back, no
11 flash, and I have a camera that has a case that
12 kind of goes around it to make it quieter, and I
13 have never had a problem.

14 THE COURT: Do you have it here so that I
15 can hear what it sounds like?

16 MR. NEHL: It is downstairs. I didn't
17 know I would be able to speak to you directly at
18 this point.

19 THE COURT: I am going to need to hear
20 what it sounds like before I can make a
21 decision, so if it is important for you to have
22 that decision made before this afternoon's
23 proceeding, you might as well go get it.

24 One of my concerns is that whatever media
25 access we have, obviously comply with the rule,

1 and that requires that it happen without notice,
2 and the degree of sound is of concern to me.

3 MR. NEHL: Okay. I'll be right back.

4 THE COURT: Thank you.

5 (Pause in proceedings.)

6 THE COURT: First, I'm trying to figure
7 out where you might be stationed, what it is you
8 might be viewing. Wherever it is, it would have
9 to be in one place and one place only.

10 MR. NEHL: Either here or over in that
11 area.

12 THE COURT: What would you intend to be
13 photographing?

14 MR. NEHL: Like questioning the witness
15 probably and counsel.

16 THE COURT: The rule says you may not
17 cover recesses of a court proceeding,
18 proceedings in chambers?

19 MR. NEHL: Uh-huh.

20 THE COURT: Conferences involving counsel
21 and the judge at the bench, conferences
22 involving counsel and their clients, which is to
23 say almost any view the parties at the table if
24 they are conferring with their lawyers would be
25 off limits. And those proceedings in this jury

1 trial from which the jury is excluded, so every
2 time the jury is out of the room.

3 MR. NEHL: Uh-huh.

4 THE COURT: So your proposal would be to
5 stand, for example, where you are now?

6 MR. NEHL: Either here or over by the
7 coats.

8 THE COURT: Just so you know, there has
9 been action going on out here which would be
10 directly in your line of sight in you were
11 standing in that corner, and the witness is, of
12 course, here.

13 MR. NEHL: This would be better for me.

14 THE COURT: Why don't you give us an
15 example of what this mind sound like as you use
16 your equipment. Go ahead. And how often to you
17 expect you would be making those sounds?

18 MR. NEHL: It would certainly not be
19 continuous. It would be intermittent at best.

20 THE COURT: Anything for the record from
21 plaintiff? Any inquiry of Mr. Nehl or any
22 statement for the record?

23 MR. GAYLORD: Dr. Benowitz -- I asked
24 Dr. Benowitz, and I don't think he has any
25 objection particularly. The only thing I would

1 say is that it just strikes me that both
2 attorneys and witnesses might be better served
3 by not having the sound of the camera going off
4 right in the middle of either a question or an
5 answer.

6 THE COURT: Mr. Nehl, would you with be
7 willing to not take a photograph in the middle
8 of someone's thought processes as they're
9 expressing a question or expressing an answer?

10 MR. NEHL: When would I be photographing
11 then, I guess is the question?

12 THE COURT: For example, someone is
13 asking a question, in the middle of the
14 sentence, they're formulating a thought, the
15 click, click, click could be distracting to
16 counsel. The witness could be in the middle of
17 answering a question and finishing a thought,
18 and click, click, click could be distracting to
19 the witness.

20 However, at the end of every question
21 there is a pause and end of every answer there
22 is a pause, and that wouldn't be distracting is
23 what I thing is being proposed?

24 MR. NEHL: It would be better for me if I
25 was photographing during an actual exchange, I

1 think, but if that is unacceptable.

2 THE COURT: Well, I can hear the shutters
3 from up here. I can hear your clicking from up
4 here. And I can appreciate that if I am in the
5 middle -- if I were the questioner and I was in
6 the middle of a particular question and trying
7 to keep my train of thought uninterrupted, that
8 could be disruptive.

9 The same is true for the witness who in
10 fairness needs to be able to concentrate on
11 answering the question, it just seems to me that
12 no one of those delays is going to be more than
13 a matter of seconds.

14 MR. NEHL: What I have found, though, is
15 when you are listening for the camera as we just
16 did here, you're listening for the sound, where
17 if there is any kind of sound in the courtroom,
18 like, for instance, people talking, you can't
19 really -- it is not really evident.

20 THE COURT: How about this: How about we
21 try it, and if -- I am not getting to a place, I
22 am suggesting to counsel in response to your
23 concern, Mr. Gaylord, that we see if the
24 shooting that the reporter chooses to make does,
25 in fact, interfere with a questioner's process

1 or a witness' answer.

2 MR. GAYLORD: I suppose it's my concern
3 because it occurred to me. I think Your Honor
4 can take care of it.

5 THE COURT: Any other concern on behalf
6 of the plaintiffs?

7 MR. GAYLORD: None, Your Honor.

8 THE COURT: For the defense?

9 MR. GAYLORD: No objection.

10 THE COURT: Mr. Nehl, you're welcome to
11 stand right where you are.

12 MR. NEHL: Can I sit down?

13 THE COURT: Sure. Would you make room
14 for him?

15 Doctor, come on back.

16 MR. COFER: We do have one matter, Your
17 Honor. What I believe I did just before the
18 break was lay a predicate to use this book as a
19 learned treatise and ask the doctor about the
20 comments in it and posed a question based on a
21 learned treatise.

22 MR. GAYLORD: May I speak to it,
23 Your Honor?

24 THE COURT: Well, you really shouldn't.
25 Mr. Thomas is on point for this witness and he

1 should be the one who addresses if plaintiff has
2 an objection to the proffer that the defense
3 contends they made adequate to use the book as a
4 learned treatise.

5 MR. THOMAS: Does the defendant object?

6 THE COURT: No. The defendant is putting
7 you on notice that they contend they've laid an
8 adequate foundation and they want to now impeach
9 as though that document, that book, is a learned
10 treatise. They are giving you an opportunity to
11 object now and resolve it before the jury comes
12 in.

13 MR. THOMAS: I don't believe that he said
14 that this was an authoritative document in the
15 area, but that it would be something, that while
16 it does not rise to the level of peer review, it
17 would be something that he would look at, but it
18 would not be something that he would necessarily
19 rely upon.

20 THE COURT: I don't believe an adequate
21 foundation was laid. The witness testified that
22 he would consider this matter in doing his
23 normal work, but the predicate has to be
24 established that the material is in fact
25 authoritative or was relied upon by the witness

1 in forming his opinion, and that foundation was
2 not laid. The objection is sustained.

3 Anything else before we bring in the
4 jury? All right. Let's get them.

5 (Whereupon, the following
6 proceedings were held in
7 open court, the jury being
8 present:)

9 THE COURT: Good afternoon, jurors,
10 welcome back.

11 Mr. Gaylord.

12 MR. GAYLORD: Your Honor, I would just
13 like to introduce Joanne Williams Branch.

14 THE COURT: Jurors, Ms. Branch is the
15 daughter of Mayola and Jesse Williams. She is
16 here in her mother's place this afternoon.

17 Now, continuing with the
18 cross-examination.

19 MR. COFER: Thank you, Your Honor.
20
21
22
23
24
25

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1 NEAL BENOWITZ

2 Was thereupon called as a witness on behalf of the
3 Plaintiff and, having been first duly sworn, was
4 examined and testified as follows:

5

6 FURTHER CROSS-EXAMINATION

7

8 BY MR. COFER:

9 Q. I have one more question about the book
10 we were discussing before we broke, but, first,
11 before we get to that, we talked some this morning
12 about the tar and nicotine levels declining 70
13 percent from the 1950s to the 1990s. Do you
14 recall that?

15 A. Yes.

16 Q. I think we basically made clear what our
17 positions were. What I want to point out is the
18 source of that information. And you're aware, of
19 course, aren't you, that that data is published in
20 the 1989 Surgeon General's Report, "25 Years of
21 Progress." Correct, Doctor?

22 A. Yes.

23 Q. Here I'll just briefly show the chart.
24 And of course, you are familiar with this
25 document, right?

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1 A. Yes.

2 Q. And it shows how tar levels have dropped
3 at the top, and nicotine levels have dropped at
4 the bottom, correct?

5 A. Right. As long as it's clear what you
6 mean by tar and nicotine levels. They are by
7 smoking machine testing.

8 Q. Yields, FTC methods, correct?

9 A. Yes.

10 Q. You're familiar with Deitrich Hoffman and
11 Klaus Broodermen (ph)?

12 A. Yes.

13 Q. Doctors Hoffman and Broodermen are
14 affiliated with the American Health Foundation,
15 correct?

16 A. That's correct.

17 Q. The American Health Foundation's senior
18 researcher is Dr. Ernst Wynder, right?

19 A. Right.

20 Q. Dr. Ernst Wynder is one of the pioneers
21 of smoking and health, right?

22 A. Yes.

23 Q. He was Ernst Wynder of the famous
24 Wynder-Graham mouse skin painting studies,
25 correct?

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1 A. Yes.

2 Q. And you do recognize Drs. Hoffman and
3 Broodermen as authorities in the field, right?

4 A. Yes.

5 Q. Particularly of changes in cigarette
6 design and composition over time and how they
7 influence yield smoke constituents, correct?

8 A. Yes.

9 Q. And you are familiar with the Journal of
10 Smoking-Related Disorders, correct, Doctor?

11 A. Yes.

12 Q. And that's a reliable journal?

13 A. Yes. Although that journal is actually
14 no longer published.

15 Q. Okay. But the fact is -- and let me just
16 show you the article. Can you see it on the
17 monitor? It's entitled, "Changes in cigarette
18 design and composition over time and how it yields
19 smoke constituents," by Drs. Hoffman, Broodermen
20 and a third researcher, I can't pronounce his
21 name?

22 A. Yes, I see it.

23 Q. And in it they also state that, "Measured
24 on the basis of standardized," your point,
25 "machine smoking conditions, the sales weight of

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1 average tar and nicotine deliveries in the smoke
2 of U.S. cigarettes had decreased from 38
3 milligrams and 2.7 milligrams in 1954 to 12
4 milligrams and .95 milligrams in 1993, which is
5 right around 65 to 68 percent. Do you accept my
6 math?

7 A. Yes.

8 THE COURT: Would you slow the pace just
9 a bit?

10 BY MR. COFER:

11 Q. One last thing on this book. Yesterday
12 you were shown Plaintiff's Exhibit 81, and this
13 was the Bird I study of the quit smoking campaign
14 in Greenfield, Iowa, in conjunction with the
15 movie. Do you recall that, Doctor?

16 A. Yes.

17 Q. Mr. Thomas pointed out the cover page,
18 and it says, "This report contains confidential
19 information which is confidential to the business
20 of the company. The information must be carefully
21 handled and not divulged to the outside sources
22 without express authorization." Did I read that
23 correctly?

24 A. Yes. Well, I can't see the bottom part,
25 but it does sound like the quote that was read

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1 yesterday.

2 Q. And also its says, "Confidential," on it.
3 Do you remember that?

4 A. Yes.

5 Q. In this book, Chapter 16, Cold Turkey in
6 Greenfield, Iowa, follow-up study, Frank Ryan,
7 same study, correct?

8 A. I believe so.

9 Q. All right. Thank you.

10 We've had quite a bit of testimony about
11 the documents from Bill Dunn, haven't we, Doctor?

12 A. Yes.

13 Q. And in fact, we pointed out that Bill
14 Dunn's nickname was the nicotine kid, right?

15 A. Yes.

16 Q. Clearly, from Dr. Dunn's documents, he
17 believed nicotine played an important role in why
18 people smoke, correct?

19 A. Yes.

20 Q. And judging from his documents, he
21 expressed that view pretty freely and fairly
22 colorfully. Would you agree with that?

23 A. Yes.

24 Q. Are you aware, Doctor, that there were
25 others at Philip Morris at the same time who

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1 disagreed with Dr. Dunn about the role of nicotine
2 in smoking?

3 A. I don't recall specifically who those
4 people were, but there may well be.

5 Q. Let me just show you a couple of
6 examples. This is Defendant's 630 from Wakeham to
7 Seligman.

8 First paragraph, "The program reviewed by
9 Dr. Dunn on smoking behavior once again prompts me
10 to express the opinion that the total emphasize of
11 our research on the psychopharmacology of nicotine
12 is wrong.

13 "I do not deny that many smokers maintain
14 the habit for psychopharmacological reasons but
15 other factors must come into play. To ignore them
16 almost completely, as the present program does, is
17 a mistake we have made too long. As a
18 consequence, for example, the industry is facing a
19 dearth of good, basic information which will
20 support the positive aspects of cigarette
21 smoking."

22 And the last paragraph on this page, "The
23 often-repeated marketing concept that smokers
24 smoke for favor is surely not entirely a figment
25 of marketing imagination. Too many smokers

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1 express taste preferences for it to be an
2 insincere gesture. Flavor must be one of the
3 motivating factors, so how can it all be nicotine
4 when there are many other flavor contributors."

5 The point is even Dr. Wakeham recognizes
6 that nicotine plays an important role, but says
7 there are other things, too, right?

8 A. Yes. I am sure that Dr. Dunn would --
9 just as I did in my testimony, talked about other
10 factors that interact with nicotine in smoking
11 behavior.

12 MR. COFER: Okay. Let's look at Fagan to
13 Seligman. Same time period. This is Exhibit
14 631, counsel.

15 BY MR. COFER:

16 Q. "Dr. Dunn has set his prime goal, the
17 solution of the problem of what it is that keeps a
18 smoker smoking. This is a laudable objective in
19 trying to answer an intriguing question.

20 "It seems, however, that he has prejudged
21 the issue and has decided that the answer is the
22 psychophysiological effects of nicotine. The
23 major effort of this group is to find evidence to
24 substantiate this single hypothesis. This is much
25 too narrow an approach.

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1 "It supposes that all smokers at all
2 times seeks the effects of nicotine. I submit
3 that there are other reasons people smoke. The
4 situational smoker to name -- only at parties,
5 only at work, to name only one other, Dr. Daniel
6 Horne and Dr. McKinnal (ph) have developed the
7 pathology of smokers.

8 "Horne has four classes; McKinnal has a
9 dozen classes. Each class is smoking presumably
10 for different reasons. Although it may be that
11 nicotine is the underlining stimulus, it seems
12 unlikely that it could account for all the
13 differences. Again, recognizes that nicotine is
14 important, but also recognizing there are other
15 things, other things that should be researched,"
16 correct?

17 A. Yes.

18 Q. And finally, here is one, this is not an
19 exhibit, not substantive evidence. I am using it
20 as impeachment.

21 MR. THOMAS: We have a problem. May we
22 approach the Court?

23 THE COURT: Let's handle this in
24 chambers.
25

1 (In chambers:)

2 MR. THOMAS: My understanding is what
3 counsel just said is this is impeach. And that
4 it was said this is not an exhibit off of the
5 exhibit list. I haven't seen it before and I
6 don't see how this is impeachment of
7 Dr. Benowitz, (a); and (b) to the extent that it
8 is evidence that it was said is not relevant.

9 MR. COFER: I'll hand the Court the
10 highlighted portion. What it is, it's a Philip
11 Morris document. It was not on the exhibit
12 list. I pulled it off the internet and it shows
13 that there is a debate within the company at the
14 applicable time about whether nicotine is the
15 reason people smoked, and people smoke and
16 nicotine isn't the reason.

17 Just again to show the date and show
18 evidence that when Dr. Benowitz testified
19 yesterday that for Philip Morris the ticket was
20 nicotine, period, end of paragraph, that is not
21 correct. There were others who had different
22 views.

23 THE COURT: Was this designated as an
24 exhibit?

25 MR. COFER: To be honest, I did not

1 anticipate needing to impeach him with that
2 testimony.

3 THE COURT: That last comment, I am
4 having trouble with. This is a witness well
5 known who your client as someone who takes the
6 position, that Philip Morris takes Position A in
7 the public and Position B in the private. This
8 isn't a new approach from the witness, is it?

9 MR. COFER: I don't think it -- I didn't
10 know who the witness was because the witness
11 wasn't disclosed. We pulled documents in
12 anticipation of a variety of witnesses. There
13 are public held witnesses who cover a bunch of
14 different territory, depending on who else is
15 coming. I missed that document. It is germane.
16 I want to use it to transition into another
17 topic.

18 THE COURT: I am sustaining the
19 objection. I think it is an exhibit that is
20 substantive and applicable and should have been
21 disclosed if you're going to use the document.
22 The subject matter is fair game.

23 MR. COFER: Thank you.

24

25

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1 (Whereupon, the following
2 proceedings were held in
3 open court, the jury being
4 present:)

5 THE COURT: Go ahead.

6 MR. COFER: Thank you, Your Honor.

7 BY MR. COFER:

8 Q. Dr. Benowitz, you're aware, are you not,
9 that within Philip Morris there were really
10 opposing views about the importance of nicotine?

11 A. I am not sure if there were opposing
12 views about the importance of nicotine, but rather
13 whether there were also other things that were
14 important.

15 Q. Okay. Let me clarify it a little. The
16 first view is that nicotine is the primary reason
17 people smoke, and without a certain level of
18 nicotine, smokers will quit. You are familiar
19 with that view, are you not?

20 A. Yes.

21 Q. In addition, there was a view that really
22 people smoked primarily out of habit and for taste
23 and that removal of nicotine really would not have
24 a big effect on the habit, that people may well
25 smoke without nicotine. Are you aware of that?

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1 A. I -- no. I don't doubt that that may not
2 have existed, but I have never read that.

3 Q. Okay. Well, yesterday, and I think even
4 today, you made the point that, in your view,
5 people don't smoke without nicotine, right?

6 A. Yes.

7 Q. That basically cigarettes without
8 nicotine would noting be successful in the
9 marketplace?

10 A. Right.

11 Q. Now, the fact is Philip Morris actually
12 introduced a cigarette without nicotine into the
13 market, right?

14 It was a product called Next, N-e-x-t.
15 And what Philip Morris did was they used
16 technology that is used for taking caffeine out of
17 coffee, and they were able to extract basically
18 all the nicotine from cigarettes, correct?

19 A. Yes.

20 Q. And they spent a bunch of money and a
21 bunch of time and a bunch of effort coming up with
22 that product, correct, Doctor?

23 A. Probably.

24 Q. Would it surprise you to learn that they
25 spent 300 million dollars trying to develop a

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1 denicotized cigarette?

2 A. I wouldn't know how to guess at that. If
3 you tell me that, I believe it.

4 Q. Okay. And the fact is they did bring it
5 to market, right?

6 A. Yes.

7 Q. People didn't buy it, right?

8 A. Yes.

9 Q. And people reported that it tasted bad,
10 right?

11 A. Yes.

12 Q. All right. Let's talk about some of the
13 words that Mr. Thomas wrote on the board, and
14 let's start with psychoactive. You would agree
15 with me, would you not, that psychoactive does not
16 mean addiction?

17 A. Yes.

18 Q. There are many things that have
19 psychoactive effects?

20 A. Yes.

21 Q. There are common substances we use every
22 day that has affects on brain receptors?

23 A. Yes.

24 Q. Sugar?

25 A. Not directly on receptors by the sugar

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1 molecule, but it can have some psychoactivity.

2 Q. How about milk?

3 A. Milk also is -- has got tryptophan which
4 is a precursor to serotonin. It doesn't have a
5 direct effect on the receptors, but can have
6 behavioral effects.

7 Q. Tell the jury how that works, how the
8 tryptophan in the milk affects the serotonin and
9 how it affects the brain?

10 A. Well, tryptophan is a precursor. It is
11 made into serotonin.

12 Q. Right. And this produces the effect,
13 sometimes milk will make you drowsy or slightly
14 sleepy?

15 A. Yes.

16 Q. Why you drink more milk if you want to go
17 to sleep?

18 A. Yes.

19 Q. There is a substance in chocolate called
20 theobromine; is that correct?

21 A. Yes.

22 Q. Is theobromine a receptor blocker?

23 A. Yes.

24 Q. What does that mean?

25 A. Well, some drugs work by combining with

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1 the receptor and doing the same thing as one of
2 the body's own hormones do. And other things,
3 like theobromine, block a substance, adenosine,
4 which normally is the substance in the body that
5 has the effects. What theobromine does is block
6 the adenosine effects.

7 Q. Now, caffeine, we talked about caffeine
8 yesterday with Mr. Thomas. Caffeine is a receptor
9 blocker, too, isn't it?

10 A. Yes.

11 Q. Now, the other thing we talked about, you
12 may even have made a drawing, is that nicotine
13 causes the brain to grow more receptors, correct?

14 A. Yes.

15 Q. Caffeine causes the brain to grow more
16 receptors, doesn't it?

17 A. Yes. Not the same time kind, they're
18 different kinds of receptors.

19 Q. But even though they're not the same
20 type, caffeine changes the brain, causes it to
21 grow more receptors, right?

22 A. Sort of. Your overall idea is right. It
23 has to do with expression and it's technical, but,
24 in general, what you say is correct.

25 Q. Okay. Reinforcing. Would you agree with

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- 1 me that if something is reinforcing, that is not
2 the same thing as saying it's addictive?
3 A. Yes.
4 Q. Lots of things are reinforcing?
5 A. Yes.
6 Q. Food?
7 A. Yes.
8 Q. Water?
9 A. Yes.
10 Q. Sex?
11 A. Yes.
12 Q. Saccharin?
13 A. Can be.
14 Q. Pain?
15 A. I suppose. It is not one of the things
16 that you usually think about as a reinforcer. It
17 is a negative reinforcer for most people.
18 Q. EEG brain waves. Lots of things cause
19 EEG brain waves?
20 A. You mean changes in EEG brain waves.
21 Q. Right.
22 A. Yes.
23 Q. Music?
24 A. It can.
25 Q. Exercise?

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1 A. Yes.

2 Q. Sugar, caffeine?

3 A. Probably. I know caffeine can. I am not
4 sure about sugar.

5 Q. Okay. Let's talk a little about
6 nicotine. Nicotine occurs naturally in the
7 tobacco plant, right?

8 A. Yes.

9 Q. Anyone who want to research nicotine can
10 do it by taking a tobacco plant?

11 A. They could.

12 Q. You don't have to work at a tobacco
13 company, correct?

14 A. Correct.

15 Q. The nicotine is available and can be
16 studied, right?

17 A. Yes.

18 Q. And in fact, nicotine had been studied
19 outside of tobacco companies for a long time?

20 A. Yes.

21 Q. Thousands of articles since the early
22 '60s?

23 A. Yes.

24 Q. Now, it was known before the Surgeon
25 General's Report was published in 1964, that

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1 nicotine was psycho activity wasn't it?

2 A. Yes.

3 MR. THOMAS: Objection, foundation, known
4 by who?

5 BY MR. COFER:

6 Q. Known outside the tobacco companies,
7 correct?

8 A. It was known by scientists, yes.

9 Q. Known by independent scientists and
10 medical authorities?

11 A. Yes.

12 Q. People whose job it was to look into the
13 issue?

14 A. Probably, if there were such people. I
15 am not sure what people you're talking about.

16 Q. Were there public health people before
17 '64?

18 A. Yes. I am not sure at what point in time
19 the public health people prior to '64 started to
20 get interested in smoking. I guess, it was the
21 early '60s when it began.

22 Q. Well, the evidence -- not the evidence,
23 what I told the jury was really the 1950s, with
24 Wynder-Graham and the epidemiological studies,
25 there really was a concentration of scientists

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1 looking at the issue systematically?

2 MR. THOMAS: Your Honor --

3 THE WITNESS: That is when the first
4 articles about smoking and lung cancer came out
5 in the '50s.

6 BY MR. COFER:

7 Q. Okay. Pharmacological active. Is that
8 different than psychoactive?

9 A. Psychoactive is just one type of
10 pharmacologic activity.

11 Q. Now, the fact that something is
12 pharmacologically active, doesn't necessarily mean
13 it is addictive, right?

14 A. Yes.

15 Q. Now, it is true, Dr. Benowitz, that it
16 has been known by scientists since the 1950s that
17 nicotine can change EEG or brain waves?

18 A. Yes.

19 Q. Yesterday you were telling us some
20 journals that were particularly well regarded.
21 Do you recall that?

22 A. Yes.

23 Q. You mentioned New England Journal of
24 Medicine?

25 A. Yes.

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1 Q. You mentioned the Journal of the American
2 Medical Association?

3 A. Yes.

4 Q. You mentioned Lancet?

5 A. Yes.

6 Q. Are you aware, Doctor, that as early as
7 1921, there was an article in Lancet saying that
8 nicotine had both stimulating properties and
9 sedating properties? What was that paradox,
10 Nesmith's (ph) Paradox?

11 A. I think it was Nesmith's Paradox.
12 Actually, I've forgotten if that was based on that
13 1921 paper, but there was a paradox that was
14 discussed for many years about how could one drug
15 both stimulate you and relax you.

16 Q. Right. And I guess the point I'm trying
17 to make is it's fair to say, isn't it, that it has
18 been noted for a long time in the scientific
19 community that nicotine has these characteristics,
20 they can sedative, they can be stimulating, they
21 can change the brain waves of smokers, correct?

22 A. Yes.

23 Q. Okay. Let's talk a little bit about pH
24 in free nicotine. That's something you discussed
25 earlier in your testimony, correct, Doctor?

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1 A. Yes.

2 Q. And basically what I understood you to
3 say is that the pH, and that's that acid versus
4 alkalinity aspect of the environment surrounding
5 nicotine can influence how much nicotine is bound
6 and how much is unbound or free, right?

7 A. Yes.

8 Q. And again, that's been known since at
9 least 1929, right?

10 A. I forget whether it was 1929, but it has
11 been known for some time.

12 Q. Lots of articles about that in the
13 scientific literature in the '70s?

14 A. Yes.

15 Q. Are you familiar with the Tobacco Working
16 Group?

17 A. I am not sure. You will have to refresh
18 my memory.

19 Q. Tobacco Working Group, a combination of
20 public health officials, Ernst Wynder and others;
21 people from the National Cancer Institute.

22 A. Yes.

23 Q. People from the cigarette companies,
24 including Philip Morris, working together to see
25 if they could develop a less-hazardous cigarette,

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1 right?

2 A. Yes.

3 Q. Are you aware in 1976, the Tobacco
4 Working Group actually recommended the companies
5 consider developing cigarettes with more free
6 nicotine?

7 A. Yes.

8 Q. The thinking was that if it was the tar
9 that caused, caused the health problems, and
10 nicotine was a fundamental reason people smoked,
11 that if you could find a way to reduce the tar and
12 keep enough nicotine, then smokers would get the
13 satisfaction they wanted, that might be a
14 responsible approach to the smoking health
15 problem, correct?

16 A. Yes.

17 Q. There was a document that Mr. Thomas
18 showed you that talked about impact. Remember
19 that?

20 A. Yes.

21 Q. And there was discussion about what
22 impact really means in cigarettes, correct,
23 Doctor?

24 A. Yes.

25 Q. Impact is a term that refers to what the

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1 smoke feels like in the back of the mouth or
2 throat, right?

3 A. Yes.

4 Q. Another word for impact is something that
5 is called throat scratch?

6 A. Yes. It is similar. It is a similar
7 concept.

8 Q. And for whatever reason, it appears that
9 a lot of people prefer cigarettes that have impact
10 or throat scratch, right?

11 A. Yes.

12 Q. Let's talk just a little bit about
13 definitions of addiction. Yesterday, I think one
14 of the first things that you told the jury was
15 your definition of addiction was compulsive use of
16 a psychoactive drug that is reinforcing. Is that
17 correct, sir?

18 A. Yes.

19 Q. And you said that that definition is
20 consistent with the Surgeon General's definition,
21 right?

22 A. Yes.

23 Q. Let's see if we can kind of summarize
24 these concepts because I know there was a lot of
25 discussion yesterday. Addiction doesn't have a

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1 set scientific meaning, right?

2 A. Well, there have been changes in what
3 different people have meant by addiction over the
4 years, that's correct.

5 Q. And that's a better way of putting it and
6 I thank you for that.

7 In a scientific way, in 1964, when the
8 Surgeon General tried to characterize cigarette
9 smoking as either a habit or an addiction, based
10 on the definition that he applied, he said the
11 product is habit forming and not addictive, right?

12 A. That's correct.

13 Q. And that was because the definition he
14 used at the time required intoxication?

15 A. Yes.

16 Q. Severe withdrawal?

17 A. Yes.

18 Q. And basically antisocial behavior, right?

19 A. Yes.

20 Q. Now, there were others, including the
21 World Health Organization, that thought there
22 should be a different definition, right?

23 A. Yes.

24 Q. Was in fact, was it in '64 that the World
25 Health Organization basically shifted from the

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1 term addiction to the term dependence?

2 A. Yes.

3 Q. And really was the precursor for the
4 definition the Surgeon General ultimately adopted
5 for addiction in 1988; is that right?

6 A. That's correct.

7 Q. So what we've had basically is different
8 uses of the word addiction to describe really
9 different standards of proof; is that fair? Or
10 maybe standards of proof isn't right, but the word
11 addiction even in the scientific community has
12 been used different ways by different people over
13 the last 30 years?

14 A. Yes.

15 Q. So if you ask somebody, "Do you think
16 this is addictive," you really need to know what
17 definition they're using, correct?

18 A. Depends on how they're asking. If you're
19 asking it in a scientific sense, yes, that is
20 correct.

21 Q. Okay. And that is a very good point and
22 that's a nice segue. The word "addiction" also is
23 used in an unscientific way, isn't it?

24 A. It is used to describe behavior, loss of
25 control over drug use, or other behaviors, but

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1 drug addiction is used and understood to have to
2 do with loss of control over drug use.

3 Q. And in terms of whether -- and you did go
4 through a discussion, I think, with Mr. Thomas
5 where you said -- and correct me if I misstate it,
6 basically it is not whether you called it
7 addiction or whether you call it dependence or
8 whether you call it habit, what is important is
9 the effect on behavior; is that fair?

10 A. That's correct.

11 Q. Now, the other -- but you did point out,
12 some people when they use the word addiction, it
13 takes on a negative or a moral connotation, right?

14 A. Yes. That was more so in the past than
15 today, but that is correct.

16 Q. Because what would happen if you'd think
17 of heroin addicts or alcoholics with delirium
18 tremens or whatever, but you had negative social
19 implications, right?

20 A. That's correct.

21 Q. And it's fair, isn't it, to some extent
22 that whole word addiction has been politicized?

23 A. I am not sure what you mean by
24 politicized.

25 Q. Let me give you examples. If you really

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1 believed cigarette smoking is a bad thing, if you
2 called the use of that an addiction rather than a
3 habit, that has some moralistic overtones that it
4 is addictive.

5 The underlying effect may be the same,
6 but what you call it may make a difference in how
7 it's perceived; is that fair?

8 A. I suppose it could be, but there are
9 other things that addiction means besides the
10 social connotations. It also means, and the
11 Surgeon General was responding to the strength of
12 the compulsion to use the drug, the difficulty of
13 quitting the drug, the neuro-chemical processes as
14 being similar. So those are also things that go
15 along with addiction which I think the Surgeon
16 General is trying to stress.

17 Q. I'll tell you, right now I'm not
18 quibbling whether cigarette smoking should be
19 called an addiction, habit or a dependence. What
20 I am really trying to get a handle on is the word
21 addiction, okay?

22 A. Yes.

23 Q. And you would agree that the word
24 addiction had been used by some because it does
25 have a negative or a moralistic component. Do you

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1 agree with that?

2 A. It has been, that's correct.

3 Q. In another way, the word is very sloppy,
4 because we hear people say all the time, "I'm
5 addicted to video games," right?

6 A. Well, I think you have to separate out
7 drug addiction from other sorts of behaviors that
8 are called addictive behaviors.

9 Q. I'll quit beating a dead horse. The
10 point is the word addiction really has so many
11 meanings that the word itself has kind of lost its
12 scientific precision. Would you agree with that?

13 A. Yes and no. I think when we deal with
14 drug addictions, then I think most people
15 understand what is meant when we talk about
16 addictions to love or whatever, I think it becomes
17 more vague.

18 Q. Is the preferred term now within the
19 field dependence?

20 A. Dependence is certainly widely used. I
21 use it.

22 Q. But we understand, what we're really
23 describing is, and for purposes of this case, can
24 you quit, how hard it is to quit, what effects
25 does smoking have that makes it harder to quit,

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1 are those effects psychological, are those effects
2 physical, and whether you call it addiction or
3 habit, the issue is the effects and whether they
4 make it harder or prevent people from quitting,
5 right?

6 A. Yes.

7 Q. Now, when you told the jury this morning,
8 that it was your professional opinion that
9 Mr. Williams was addicted to use of tobacco before
10 1955, you were using the definition that you gave
11 us yesterday, right? Your definition, right?

12 A. Yes. I was using the definition that has
13 to do with the likely difficulty in stopping the
14 use of cigarettes.

15 (Discussion between
16 counsel, off the record.)

17 MR. THOMAS: Judge, we're going to need a
18 ruling.

19 THE COURT: All right. Counsel would you
20 step to chambers, please.

21 (In chambers:)

22 MR. THOMAS: I can tell you why I
23 objected. Out in the courtroom, Mr. Cofer
24 showed me a Philip Morris document we referred
25 to this morning in which Philip Morris made the

1 finding that a number of the available smoking
2 cessation aids are not effective and that was a
3 document that we discussed with Dr. Benowitz.

4 So then he showed me an advertisement for
5 Nicorette gum and told me that he is going to
6 impeach Dr. Benowitz with an advertisement for
7 Nicorette gum, but the fact of the matter is he
8 is trying to impeach his own people in their
9 statements in the exhibit that is in front of
10 the jury.

11 THE COURT: So what is your evidentiary
12 objection?

13 MR. THOMAS: (A) not on the exhibit list,
14 (B) improper impeachment, and (C) hearsay.

15 MR. COFER: Let me tell you what I was
16 trying to do. It is plaintiff's Exhibits 140,
17 the highlighted portion is the applicable part
18 of the testimony.

19 Basically it says, quote, "Available data
20 suggests" -- let me emphasize that, "Available
21 data suggests that nicotine gum, patches, are
22 only minutely effective in helping smokers quit
23 unless combined with behavioral therapy."

24 The Court may remember in documents
25 yesterday, Dr. Benowitz was asked did Philip

1 Morris ever tell Jesse Williams that these
2 patches and gum that he brought that they needed
3 other therapy, and he said, "No, I am not aware
4 of that."

5 Well, we learned this morning that in
6 1989, Mr. Williams, in fact, was prescribed
7 Nicorette gum. Here is the package inserts that
8 goes with the Nicorette gum. It says, "You must
9 really want to quit smoking, to be used together
10 with a support program. See Page 3 for
11 details."

12 Page 3, "You are more likely to quit
13 smoking by using Nicorette by using a support
14 program that helps you break your smoking
15 habits. There may be support groups in your
16 area. Call your local chapter of the American
17 Lung Association, American Cancer Society,
18 American Heart Association for further
19 information," et cetera.

20 Here is why it is relevant. First, it
21 need not be listed because it is an impeachable
22 exhibit; second, the memo on 144 refers to
23 available data.

24 THE COURT: It's hearsay.

25 MR. COFER: It is not offered for the

1 truth of the matter asserted.

2 THE COURT: You are. You are wanting to
3 cite the contents of those examples by means the
4 Nicorette program would be successful and that
5 is --

6 MR. COFER: Maybe I haven't articulated
7 myself well. What I am trying to show is a
8 causation link. Plaintiff is saying we should
9 have told Mr. Williams that Nicorette gum
10 wouldn't have done it. He needed to use
11 Nicorette gum in combination with some sort of
12 smoking cessation group. He does not have that
13 information; therefore, he's was doomed to
14 continue smoking.

15 THE COURT: I able not suggesting that
16 you aren't able to prove in some admissible way
17 what a person would have known from the product
18 information. What I am saying is this document
19 is hearsay for its purpose with their witness.

20 MR. COFER: I can ask, I assume, the
21 witness about the success --

22 THE COURT: He may know that Nicorette is
23 most successful when used with a behavior
24 modification program. You may inquire of his
25 knowledge. You can't impeach him with a

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1 document that is hearsay.

2 It is not authenticated whatsoever. What
3 you are telling me is a Nicorette ad, it is not
4 attributed to Philip Morris, it is not part of
5 the original exhibits. Object sustained.

6 MR. COFER: Thank you.

7 (Whereupon, the following
8 proceedings were held in
9 open court, the jury being
10 present:)

11 THE CLERK: Court is in session.

12 THE COURT: All right, Mr. Cofer.

13 MR. COFER: Thank you, Your Honor.

14 BY MR. COFER:

15 Q. Yesterday, Dr. Benowitz, you were shown
16 Plaintiff's Exhibit 144. This is the memo from
17 Carolyn Levy to Bill Campbell, regarding smoking
18 cessation technology. Do you recall it, Doctor?

19 A. Yes.

20 Q. The highlighted portion was that which
21 was read to you, and it says, quote, "Available
22 data suggests that nicotine gum, patches, are only
23 minimally effective in helping smokers quit unless
24 combined with behavioral therapy. Do you recall
25 that, sir?

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1 A. Yes.

2 Q. And I think you told us this morning, and
3 let me refer to Defendant's Exhibit 910. This is
4 the chart you drew on attempts to quit. Do you
5 recall that, Doctor?

6 A. Yes.

7 Q. You told the jury that in September of
8 '89 --

9 THE COURT: Mr. Cofer, you put that in
10 the jurors' line of sight.

11 MR. COFER: I meant to turn it so they
12 can see it.

13 THE COURT: If you are going to do that,
14 why don't you bring it up to the next to the
15 witness. He can see it; they can see it.

16 MR. COFER: Thank you, good suggestion.

17 THE COURT: That's what they pay me for.

18 MR. COFER: It is getting late in the
19 day.

20 BY MR. COFER:

21 Q. This is your list on attempts to quit,
22 and you told the jury in September '89, he was
23 prescribed Nicorette chewing gum, right?

24 A. Yes.

25 Q. That is a prescription from a physician,

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1 correct?

2 A. It was at that time.

3 Q. Is it your experience as a physician that
4 you when you prescribe medication you give the
5 patient instructions how to use it or tell them to
6 read the package inserts?

7 A. Hopefully.

8 Q. Do you ever prescribe Nicorette or
9 nicotine chewing gum?

10 A. Yes.

11 Q. Do you tell your patients how to use it?

12 A. Yes.

13 Q. Do you tell them to read the package
14 inserts?

15 A. Yes, I do, but unfortunately many
16 physicians don't do a very good job of doing this.

17 Q. Right. And you, of course, have no idea
18 what Mr. Williams' physicians told him, right?

19 A. That's correct.

20 Q. But you are familiar with Nicorette gum
21 as a product, right?

22 A. Yes.

23 Q. Do the manufacturers of Nicorette gum
24 have package inserts where they advise the patient
25 that in order to quit, you must really want to?

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1 A. Yes.

2 MR. THOMAS: Objection, foundation. No
3 time -- no time period included in the question.

4 THE COURT: Rephrase your question to
5 make it time specific, please.

6 BY MR. COFER:

7 Q. In 1989, did the makers of Nicorette gum
8 includes package inserts that said, "You must
9 really want to quit smoking for Nicorette to help
10 you"?

11 A. Well, to be precise about this, I don't
12 know exactly what the package insert said in 1989
13 compared to any other time, but that is a general
14 component of the package insert.

15 Q. Is it also a general component of the
16 package insert, over your experience with it, to
17 instruct the patient that they're more likely to
18 stop smoking by using Nicorette with a support
19 program that helps them break the habit.

20 MR. THOMAS: Objection, no foundation.

21 MR. COFER: During the time that you
22 were -- that you have been a physician, that you
23 have been dealing with people, help quit
24 smoking, that you have been familiar with
25 Nicorette gum.

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1 MR. THOMAS: Objection, request for a
2 ruling.

3 THE COURT: I think his objection is
4 seeking that you make your question specific to
5 the time period where the evidence shows
6 Mr. Williams received the prescription.

7 Is that the point you're making?

8 MR. THOMAS: That's correct, Judge.

9 MR. COFER: Let's do it this way.

10 BY MR. COFER:

11 Q. Let's do it this way. You are familiar
12 with the package inserts for Nicorette, correct?

13 A. Yes, in general. I can't tell you
14 exactly what it said in 1989, but I am familiar
15 with the package insert in general.

16 Q. And you prescribe Nicorette gum on
17 occasion, correct?

18 A. Yes.

19 Q. You have over the years, correct?

20 A. Yes.

21 Q. Are you aware of any major changes, do
22 you recall any major changes in the package
23 inserts?

24 A. No. There was a minor change when the
25 form of gum was added, but I don't think it's been

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1 a major change, no.

2 Q. Do you have a recollection at any time
3 that in the package inserts the patient was
4 instructed that they were more likely to stop
5 smoking by using Nicorette with a support program
6 that helps you break your smoking habit?

7 A. Yes, that has been in the package insert.

8 Q. And in addition, in the package insert,
9 isn't it true that the insert would advise the
10 patient they can call their local chapter of the
11 American Lung Association or the American Cancer
12 Society or the American Heart Association for
13 further information about those programs?

14 A. Yes.

15 Q. Are you aware, Doctor, that Portland has
16 long had smoking cessation clinics?

17 A. I am familiar with the Kaiser program.
18 That's the only one I am familiar with in
19 Portland.

20 Q. Thank you, Doctor. Are the you familiar
21 with the Portland Adventist program?

22 A. No.

23 MR. COFER: Your Honor, if we could take
24 about a ten-minute break, I think I could get a
25 handle on where I am and when we could wrap up.

1 THE COURT: Jurors, go ahead and take
2 your afternoon recess now. Please leave your
3 notes in court. Don't discuss the case at all.
4 Watch your step coming out of the box.

5 (Whereupon, the following
6 proceedings were held in
7 open court, out of the
8 presence of the jury:)

9 THE COURT: Counsel, Mr. Rice passed me a
10 note that some jurors made the point to him that
11 they were aware they could not discuss the case.
12 They wanted to know if that meant they could not
13 discuss the pace of the trial. I instructed him
14 to tell the jury they cannot discuss the pace of
15 the trial, but forewarned.

16 Go ahead and step down, sir.

17 MR. DUMAS: Your Honor, take a few
18 seconds. I would like to submit to the Court
19 the defendant's request for cautionary jury
20 instructions on the various items that we've
21 talked about regarding, number one deals with
22 pre-September 1988 conduct; number two, deals
23 with advertising, which I believe we'll get into
24 early next week; number three deals with
25 preemption; number four deals with other

1 diseases; number five deals with industry
2 documents; and number six deals with evidence of
3 cigarettes being defective; and number seven is
4 neutralization.

5 I will provide the Court with an original
6 and one copy, and that's for counsel.

7 THE COURT: If you will let me know when
8 you request these be given, then counsel can
9 plan to be ready to discuss them.

10 MR. DUMAS: I guess we can talk about
11 that, Your Honor. Some of these items we have
12 already dealt with. It might have be
13 appropriate -- it might have been appropriate,
14 frankly, had I tendered these to the Court at
15 the beginning of plaintiff's case, but frankly
16 we were still working on them. One
17 consideration might be to have counsel review
18 them and perhaps we can discuss those being
19 provided to the jury on Monday morning.

20 MR. THOMAS: May I make a suggestion?

21 THE COURT: The next time you want an
22 instruction given, let me know on the merits.
23 In the meantime, you can discuss them and we'll
24 have an opportunity to discuss them on the
25 merits. I appreciate the work product.

1 MR. THOMAS: May I make a suggestion, and
2 that is that various lawyering efforts in this
3 case are going on here in the courtroom, and
4 also in the respective offices.

5 Providing it to the lawyers in the
6 courtroom almost guarantees that it will not get
7 back into the lawyers in the office until the
8 end of the court day which creates unnecessary
9 delay, so I would request that defense counsel
10 please fax this from the office to the office,
11 so the person who everyone knows is going to
12 respond this, Mr. Coon, can begin working on it
13 so we can be prepared.

14 MR. DUMAS: I will make that phone call
15 right now, Mr. Thomas.

16 (Recess taken, 2:30 to
17 2:48 p.m.)

18 THE COURT: Are we ready for the jury?

19 MR. COFER: We are, Your Honor. I
20 anticipate needing ten minutes.

21 MR. THOMAS: Could the doctor have his
22 file back?

23 MR. DUMAS: We had it for ten seconds,
24 Mr. Thomas.

25 MR. THOMAS: Well, you guys didn't ask

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1 for it until ten seconds ago.

2 THE COURT: Mr. Thomas, he'll get it back
3 when they're finish.

4 MR. THOMAS: Judge --

5 THE COURT: He knows how to ask for his
6 file if he needs it. He's done just fine. If
7 he needs his file, he'll ask for it.

8 Okay. Bring in the jury.

9 (Whereupon, the following
10 proceedings were held in
11 open court, the jury being
12 present at 2:50 p.m.:)

13 THE COURT: Mr. Cofer.

14 MR. COFER: Thank you.

15 BY MR. COFER:

16 Q. Dr. Benowitz, one more brief topic.

17 You talked briefly this morning about
18 withdrawal. Do you remember that?

19 A. Yes.

20 Q. I want to talk with you about the
21 spectrum of withdrawal, depending upon the
22 substance, okay?

23 A. Yes.

24 Q. Let's start with heroin. You would
25 degree, wouldn't you, that withdrawal from heroin

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- 1 is quite different than withdrawal from nicotine?
2 A. Yes.
3 Q. Heroin withdrawal can require
4 hospitalization?
5 A. It doesn't usually, but it can.
6 Q. How about barbiturates? With
7 barbiturates you get abdominal cramps?
8 A. Yes.
9 Q. Hypothermia?
10 A. Yes.
11 Q. Conversions?
12 A. Yes.
13 Q. Overall weakness?
14 A. Yes.
15 Q. Alcohol, seizures?
16 A. Yes.
17 Q. Hallucinations?
18 A. Yes.
19 Q. Disorientation?
20 A. Yes.
21 Q. Delirium tremens?
22 A. Yes.
23 Q. Tell the jury what DTs or delirium
24 tremens are.
25 A. That's an extreme aspect of alcohol

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1 withdrawal where people become extremely confused,
2 they don't know where they are. They often have a
3 high fever, sweating, may see things that aren't
4 there. Develop shakes or tremors and often have
5 seizures, and full blown delirium tremens can be
6 fatal if it is not treated.

7 Q. And finally, let's get to nicotine
8 withdrawal. I think you described the classic
9 symptoms which are irritability?

10 A. Yes.

11 Q. Ex-smoker, smoker trying to quit, may
12 become impatient?

13 A. Yes.

14 Q. Headaches?

15 A. Yes.

16 Q. Some sleep disturbance?

17 A. Yes.

18 Q. This condition, anhedonia?

19 A. Yes.

20 Q. And that's generally just not feeling
21 right or just not feeling like yourself?

22 A. That's part of it, yes.

23 MR. COFER: Thank you, Dr. Benowitz, I
24 appreciate it.

25 THE COURT: Redirect.

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1 REDIRECT EXAMINATION
2

3 BY MR. THOMAS:

4 Q. I'd like to go into a couple of things
5 that were brought out during your
6 cross-examination by Mr. Cofer.

7 I would like to direct your attention,
8 first of all, to Exhibit 126, which is the DeNoble
9 rat study report. Do you remember that one?

10 A. Yes.

11 Q. And direct your attention to Exhibit 127,
12 and ask that you please come down to the monitor.
13 I am going to represent to you that this is a
14 letter --

15 MR. COFER: I'll object to it as beyond
16 the scope.

17 THE COURT: May I see it, please.
18 (Sidebar conference
19 between Court and counsel,
20 off the record.)

21 THE COURT: Excuse us, jurors. I need to
22 take this up outside your presence.

23 (In chambers:)

24 THE COURT: State what you're about to
25 proffer, Mr. Thomas.

1 MR. THOMAS: All right. In summary, this
2 is a letter directly responsive to the
3 impeachment of Dr. Benowitz, regarding the
4 openness versus secrecy connected with research
5 by Philip Morris.

6 It is Exhibit 127, which has been
7 demarginaliaed, from counsel to Philip Morris,
8 in which I've got several quotes, but the bottom
9 line is it is obvious that such report and it's
10 reasoning to that DeNoble report, which is the
11 foundation which has undesirable implications
12 for smoking and health litigation, tolerance is
13 frequently cited at one of the marks of
14 addiction which we just finished him going
15 through.

16 It is the industry's position that one of
17 the classic criterias for addiction is tolerance
18 and that such has not be demonstrated in the
19 case of nicotine. While it is true that the
20 mele, M-e-l-e, does not discuss smoking in
21 particular or attempt to extrapolate there
22 experimental findings beyond the laboratory,
23 there is nevertheless the indication simply by
24 the fact that Philip Morris doing the research
25 that it is viewing the research as relative to

1 smoking behavior.

2 And then that it is such views and
3 reports are clearly at variance with motions
4 which the industry takes in regard to nicotine
5 and smoking and that despite the author's
6 position, the results are extremely unfavorable.

7 And thus research such as this
8 strengthens the adverse indications against
9 nicotine as an addictive drug and that it has
10 undesirable and dangerous implications for
11 litigation positions the industry takes.

12 And this will be tied up with the
13 testimony of another witness who will come in
14 and testify that, in fact, the specific research
15 that is being discussed as being against the
16 industry's position was shortly thereafter
17 terminated and the rats were killed and it all
18 disappeared.

19 MR. COFER: A couple things, first,
20 actually the last line of questions was
21 withdrawal, not tolerance; two completely
22 different problems. This deals with the DeNoble
23 lab closing. I did not touch it in my cross. I
24 do have documents that I did not use because
25 they didn't go into it on direct.

1 First of all, this witness has no
2 firsthand knowledge; second, it is beyond the
3 scope of cross-examination. If Your Honor
4 permits him to go into this, I would like an
5 opportunity to recross using the documents, but
6 as a point, the person who does have knowledge
7 of this is coming next week, Bill Farone.

8 THE COURT: I am sustaining the objection
9 as beyond the scope of direct.

10 MR. COFER: I just asked if there was
11 another here that we were going to fight about.
12 Do you have it with you?

13 MR. THOMAS: I have a document that has a
14 quote on a page, it's an ADI release, and it is
15 underneath one of their stamps that was produced
16 in connection with Texas litigation. I can't
17 take it out because it is on the text.

18 THE COURT: Why do you have to display it
19 to the jury?

20 MR. THOMAS: I'll just read it.

21 THE COURT: Yes. The frequency of this
22 is extremely disruptive to the jury. You have
23 to bring it up ahead of time.

24

25

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1 (Whereupon, the following
2 proceedings were held in
3 open court, the jury being
4 present:)

5 THE COURT: All right. Jurors, we
6 resolved that issue, and we're ready to
7 continue.

8 Mr. Thomas.

9 MR. THOMAS: Thank you, Judge.

10 BY MR. THOMAS:

11 Q. In regard to the question in terms of the
12 politicalization of the term "addiction," this is
13 part of 162, first paragraph, news release of
14 1988.

15 MR. COFER: Thank you.

16 BY MR. THOMAS:

17 Q. And I am going to read it to the jury.
18 This is a press release from the Tobacco Institute
19 in response to the 1988 Surgeon General's Report,
20 and my question to you is, first, I'll read the
21 quote and then I'll ask the question.

22 The release says, "Clearly the report
23 issued by the Surgeon General's Office today is
24 politically rather than scientifically motivated.
25 After all the Surgeon General's opposition to

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1 smoking is well known, as is his goal of a
2 smoke-free society by the year 2,000."

3 Now, in terms of the question of
4 addiction about being political, is there, within
5 the mainstream world academic community, among the
6 approximately 100 scientists who consulted with
7 and reviewed the 1988 Surgeon General's Report, is
8 there controversy regarding the definition of the
9 word addiction, and whether or not nicotine
10 properly belongs within it?

11 A. There was very little controversy. I
12 don't recall any, there may have been some, but it
13 was not -- it was not questioned. Again, we made
14 it clear in the report that the use of addiction
15 was to stress the strength of the compulsive use
16 of the drug, and to say that the strength is as
17 strong as alcohol and heroin and cocaine.

18 In fact, we went through a detailed
19 analyses of the number of people who quit when
20 they try to quit. The number of people who become
21 addicted when they try to use the drug.

22 We analyzed a lot of different aspects of
23 all the drugs, including nicotine, and came out
24 with the fact that nicotine, with the exception of
25 intoxication and life-threatening withdrawal

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1 symptoms and antisocial behavior, those are not
2 relevant, but in terms of everything having to do
3 with the strength of the drug use habit or
4 behavior or whatever you call it, the drugs were
5 very similar.

6 That was the basis, and it is stated in
7 the report why addiction was used. And the other
8 scientists did not disagree with that.

9 Q. In regard to the twin study, do you
10 remember Mr. Cofer asked you about that?

11 A. Yes.

12 Q. I will not put it on the monitor, but I'm
13 going to represent to you that Exhibit No. 162 is
14 a press release from the Tobacco Institute from
15 1974, approximately, I think, maybe two years
16 after the book that Dunn edited got sent up to the
17 PSU library.

18 And I am going to read you their
19 interpretation of the twin report study meaning
20 and ask you if you agree or disagree with them,
21 sir. This is part of the press release that was
22 sent to newspapers around the country by the
23 Tobacco Institute of which Philip Morris was a
24 member.

25 "As we look now at more recent findings

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1 with respect to such influences on health as
2 environment and pollution, sex and race
3 differences, geography and genetics, it becomes
4 obvious that the research which lies ahead will be
5 much more significant than what has already been
6 done. Take genetics alone. Corngay" (ph), who
7 was with the Tobacco Institute, "Corngay
8 continued, quote, a receipt study of 18,000 twins
9 showed that among identical twins there was no
10 difference in mortality even when one twin smoked
11 and the other did not.

12 "While there were higher mortality rates
13 among the smokers in general; in other words,"
14 continuing the quote, "when genetic traits are
15 virtually the same, the, quote, association, end
16 quote, between smoking and mortality virtually
17 disappears."

18 Going to the end of the page, "Could it
19 be, Corngay asked, that a high AHH level, rather
20 than cigarettes, is, in fact, responsible, thus
21 explaining why the vast majority of smoker do not
22 develop lung cancer.

23 Now, is this inconsistent or consistent
24 of your understanding of the studies that have
25 done with on twins in regard to the implications

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1 about causation of lung cancer by smoking
2 cigarettes?

3 A. Well, it's complicated. That study talks
4 about different things. The twin studies I was
5 talking about were the ones having to do with
6 nicotine addiction. I actually have not read that
7 study that you talked about, and without reading
8 it, it is hard for me to comment.

9 The AHH business relates to individual
10 susceptibility for lung cancer, because only one
11 out of ten smokers develops lung cancer, and the
12 question is: Why don't the other nine develop it?
13 There may well be that there is some enzyme
14 difference.

15 That's what that's talking about, maybe
16 if one twin is protected, the other twin is
17 protected. So we know there is a big genetic
18 factor in terms of which smokers develop lung
19 cancer, but the basic study, I have not read that
20 study. I can't comment on that.

21 Q. All right. In regard to the position
22 that has consistently been taken by the tobacco
23 industry, the Tobacco Institute and Philip Morris,
24 has there been an attempt to perpetuate
25 controversy or create controversy about the

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1 linkage between cigarette smoking and lung cancer
2 and the question about addiction and nicotine?

3 MR. COFER: Objection, beyond the scope,
4 beyond this witness' expertise.

5 THE COURT: Overruled. The objection is
6 overruled.

7 Go ahead.

8 THE WITNESS: I want to make sure I
9 understand the question. It sounds like there
10 were two different questions you were asking me.

11 BY MR. GAYLORD:

12 Q. In regard the position taken by Philip
13 Morris and its organization, or an organization of
14 which it is a part, the Tobacco Institute, or the
15 Tobacco Industry Research Council, has Philip
16 Morris in that organization taken the consistent
17 position that not enough is known about the
18 connection between cigarettes and lung cancer to
19 make a clear connection; and that, secondly,
20 nicotine and the word addiction cannot be properly
21 associated?

22 A. Yes. The industry has stated on many
23 occasions that there is no proof that cigarette
24 smoking causes lung cancer.

25 Q. And that's in regard to cigarettes and

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1 addiction?

2 A. And they have said that cigarette smoking
3 is not addictive, and nicotine is added for flavor
4 or present for flavor, but its not the major
5 factor that makes people smoke cigarettes.

6 Q. Is that position consistent or
7 inconsistent with the concepts put forward to the
8 people at the conference and contained in the book
9 that was sent to the college library that a puff
10 is a dose, a cigarette is unit, a pack is a
11 container for a day's supply of nicotine?

12 A. It is absolutely inconsistent with that
13 idea.

14 MR. THOMAS: Thank you, no further
15 questions.

16 THE COURT: Thank you, Doctor. You may
17 step down.

18 Jurors, we're at a point where we're not
19 going to have any more evidence today, so I am
20 about to let you go for the week. I wanted to
21 pass on to you some observations, so that you
22 don't little the wrong impression.

23 We've been a week together now and we
24 have finished one witness, and you might be
25 wondering how are we possibly going to finish in

1 four weeks a trial if everybody testifies whose
2 name I read to you during jury selection.

3 Well, first of all, there are witnesses
4 who are shorter witnesses and witnesses who are
5 longer witnesses. It is not at all unusual at
6 the beginning of a trial of this nature, that
7 foundation and background purposes more time is
8 taken with certain witnesses than others, so
9 don't be alarmed that this witness has taken two
10 days relative to the schedule.

11 Second, the list that I read off you are
12 the full possibilities of who may testify. That
13 does not guarantee every one of those people is
14 going to be called, because in the course of a
15 trial, plans change, and the lawyers don't
16 necessarily call everyone, so don't be concerned
17 about that.

18 We are, in fact, on schedule. It might
19 not feel like it from where you sit, but we are.
20 I want you to know that your attention and work
21 this week has been very much appreciated. You
22 are free to go. You'll leave your notes here.

23 You'll remember not to discuss the case
24 at all with anyone, and to avoid all forms of
25 publicity or media attention to the case and to

1 the subject. Monday morning I need you in the
2 jury room across the hall ready to go at 9:15.
3 Have a good weekend. Thank you very much,
4 folks, good night or afternoon, I guess.

5 (Whereupon, the following
6 proceedings were held in
7 open court, out of the
8 presence of the jury at
9 3:15 p.m.):

10 THE COURT: We have work to do and we can
11 start right now, or if you need five minutes to
12 get organized, we can do what, too. Let's take
13 five minutes so you can figure out what we can
14 do. We're off the record.

15 (Recess taken.)

16 MR. RANGLES: I believe we decided to
17 start with the objections and the cross
18 designations for Uydess testimony, U-y-d-e-s-s,
19 and I will try to be brief. Can I have the
20 Court's permission to sit?

21 THE COURT: Yes.

22 MR. RANGLES: If you have our chart form
23 of objections, Your Honor.

24 THE COURT: I do.

25 MR. RANGLES: And these start on this the

1 edited copy, the trial says Volume 146.

2 THE COURT: Yes.

3 MR. RANGLES: We tried to match them up,
4 although on occasion we were a little off, and I
5 will explain. The first one is on the second
6 page, and it is just the designation of counsel.

7 MR. TAUMAN: Your Honor, do we want to
8 take these one at a time, because we have no
9 objection to this, we did not intend -- this was
10 just put on there to show that they were present
11 and represented. We are not planning on reading
12 the designation of counsel.

13 THE COURT: All right. That makes that
14 moot.

15 MR. COFER: The next objection, Your
16 Honor, I am going to withdraw, which is the only
17 other one on the front page of that sheet.

18 THE COURT: Excellent. We're making
19 great progress.

20 MR. RANGLES: The next one is on Page 48.

21 THE COURT: All right, I'm there.

22 MR. RANGLES: Starting on Lines 6 and 7.

23 MR. TAUMAN: Isn't that 49, or is it 48?

24 MR. RANGLES: Yes, I'm sorry, 49 pages,
25 Lines 6 and 7, although I suppose that is an

1 awkward place, but also then 49, 12 through 16,
2 and the point here is just foundation and
3 hearsay.

4 THE COURT: Help me out here, Mr. Tauman.

5 MR. TAUMAN: Well, I hope to help you out
6 and shorten this. It's our position that Philip
7 Morris was, in fact, present. And that is part
8 of the predicate for getting these into
9 evidence. They were represented. They were
10 present. They heard the testimony.

11 They made several objections that are
12 noted in the record, and not having made such an
13 objection that was available to them then, this
14 did not apply to things like motions in limine
15 in this case. Those objections are waived, so
16 that will sort of cut down on our work.

17 THE COURT: Let me back up a moment.
18 Tell me who this witness is relative to Philip
19 Morris.

20 MR. TAUMAN: This is a former Philip
21 Morris employee who is testifying, a scientist,
22 a chemist, I believe, left their employ and is
23 testifying in the Miami trial that is currently
24 going on, the Engle case, as a witness for the
25 plaintiff or plaintiffs in that case.

1 THE COURT: And the transcript before me
2 is the transcript of his trial in the Florida
3 case?

4 MR. TAUMAN: Correct.

5 THE COURT: And Philip Morris is a party
6 to the Florida case?

7 MR. TAUMAN: Correct, is a party.

8 THE COURT: And your point with regard to
9 the current objection and many others is that if
10 the objection was not made at the time of trial,
11 it's waived for purposes of this proceeding.

12 MR. TAUMAN: That's correct.

13 THE COURT: And your authority for that
14 is?

15 MR. TAUMAN: Well, we looked and there
16 doesn't seem to be any Oregon case law. I guess
17 it is a matter of logic in the sense, if the
18 rule requires them, in order to have the
19 testimony admissible at all, requires that the
20 adverse party be present and participating and
21 have a similar motivation to proceed.

22 And I don't think any of those issues
23 have been raised. It is a matter of judicial
24 efficiency that these objections should be
25 raised. There are situations where had they

1 been raised -- had they been raised and decided,
2 for instance, some of these are lack of
3 foundation, had they been raised at the time,
4 then the questioner could have provided the
5 foundation at the time.

6 So I have to say we did look under the
7 Oregon hearsay rule, this is a former testimony
8 rule, and found no authority on this point. And
9 I believe we did not pursue the federal rule
10 where often there is case authority on these
11 issues.

12 THE COURT: Okay. Mr. Randles.

13 MR. RANDLES: Your Honor, there is a very
14 good reason why there is no authority for this
15 principle, because this principle is
16 inapplicable. Keeping in mind the different
17 context when these trials happen, you'll see why
18 there shouldn't be this rule of, "Well, if it
19 came in in one case, it has got to come in in
20 another."

21 There are different rules under which the
22 testimony is taken from state to state. We
23 talked about that. One example that doesn't
24 apply to this is a fine example, is the Oregon
25 rule about learned treatises, and I suspect

1 we'll run into that in some of this testimony.

2 The second issue of importance,
3 Your Honor, is different motions in limine
4 decided. Many of these issues may well have
5 been resolved by Judge Kaye by motions in
6 limine, and that's why specific objections were
7 not raised in the testimony.

8 We don't know that, and, frankly, the
9 purpose in offering prior testimony is to
10 expedite proceedings, not to have to
11 reinvestigate all of the evidentiary findings in
12 prior proceedings.

13 Third, Your Honor, there are different
14 bench conferences. We have no way to tell how
15 many of these issues were resolved in bench
16 conferences and in chambers, as many of the
17 issues are in this case. My hearsay objection
18 is not that the testimony is hearsay. My
19 objection is to the testimony which is within
20 itself containing hearsay, Your Honor.

21 THE COURT: I think I need to take up
22 every objection on the proffer as though the
23 witness was testifying here live, and so I have
24 to evaluate the objection in the form presented
25 against the purpose for which the evidence is

1 offered and simply make a call.

2 I don't think the fact that that
3 objection did not happen to be made of record,
4 precludes the objection being made at this
5 proceeding, so let's address the merits of the
6 foundation objection on Page 49.

7 MR. TAUMAN: Well, I guess the easy way
8 to do it is that this was a witness who was in a
9 position to know the information that he was
10 testifying to -- I am not sure how the term
11 foundation is being used when there is no
12 foundation for his expertise or no foundation
13 that he was in a position to hear the statements
14 that were being made.

15 But all I can say is that he was there.
16 He was part of the research team that he talked
17 about. The worked at the overall division where
18 the man that he is referring to, Mr. Osvene,
19 O-s-v-e-n-e, worked. And of course, they can
20 always bring Dr. Osvene in to testify.

21 THE COURT: Let me read the answer.

22 (Pause in proceedings.)

23 THE COURT: Anything else, Mr. Randles.

24 MR. RANGLES: Your Honor, it is correct
25 he was a researcher at Philip Morris. I have

1 not objected to any of the testimony that he has
2 about his own research, and that is matters
3 about which he has personal knowledge.

4 I believe he testified there were several
5 hundred people who worked at that Philip Morris
6 department at that time. These are questions
7 about INBIFO. This particular witness, as is
8 indicated, had no personal dealings with INBIFO,
9 and he's passing along second and third hand
10 information.

11 There will be testimony in this case from
12 folks that the plaintiff's bring in or we'll
13 designate, folks that would have first hand
14 knowledge about this subject. This is just not
15 one of them.

16 THE COURT: The objection is overruled.
17 The answer is generally responsive to the
18 question.

19 Your next objection is on Page 51, Lines
20 3 to 13.

21 MR. RANGLES: I assume the same ruling
22 would apply, Your Honor.

23 THE COURT: Is this still about the same
24 subject matter?

25 MR. RANGLES: Yes, it is. It is much

1 more detailed of him repeating things that he
2 heard in conversations with others, but I have
3 nothing knew to add.

4 THE COURT: The objection is overruled
5 there.

6 Now, we move to Volume 147, Page 7.
7 Relevance excluded by agreed motion in limine.
8 Help me out here.

9 MR. RANGLES: Your Honor, there is a lot
10 of discussion here about the work this fellow
11 did for a subsequent company, that did
12 pharmaceutical work and interaction with the
13 Food & Drug Administration, and his views about
14 tobacco and nicotine and whether it should be
15 regulated by the FDA, and we have a motion in
16 limine on that subject, and I think all of that
17 is out.

18 MR. TAUMAN: Your Honor, I believe that
19 this probably is excluded by the motion in
20 limine. I am not sure how far the motion
21 reached, whether it's FDA regulation or just the
22 mention of the word FDA, but this is why we're
23 not going to argue about this.

24 THE COURT: All right. So you'll strike
25 the matter to which the objection was raised

1 from your proffer?
2 MR. TAUMAN: Yes, Your Honor.
3 MR. RANGLES: That is also my next
4 objection. Page 10, Lines 2 through 16, it is
5 precisely the same objection.
6 MR. TAUMAN: I'm sorry, this is on page?
7 MR. RANGLES: Page 10, Lines 2 through
8 16, same objection.
9 MR. TAUMAN: I think it is the same
10 issue.
11 THE COURT: So those proffers are
12 withdrawn by plaintiff.
13 Now we're down to Page 11, Line 4,
14 through Page 16, Line 18.
15 MR. RANGLES: Yes, Your Honor, I would
16 like to withdraw my objection to Page 12, Line
17 18 through Page 13, Line 11.
18 THE COURT: Give them a chance to absorb
19 that and figure out what is in and then what
20 their position will be.
21 MR. TAUMAN: Wasn't that the withdrawal
22 of the whole first part of that, the relevant
23 lack of expertise?
24 MR. RANGLES: Yes, I am withdrawing that.
25 MR. TAUMAN: We're on Page 13, Line 16;

1 is that right?

2 MR. RANGLES: Yes, 13, Lines 16, through
3 Page 14, Line 3. It is foundation objection.
4 And I believe that the Court's prior ruling
5 probably applies.

6 THE COURT: The foundation objection is
7 overruled.

8 MR. RANGLES: Your Honor, my next two
9 objections overlap, Page 14, Lines 4 through 24,
10 they're excluded by two of the motions in
11 limine, one regarding Philip Morris' other
12 businesses, that was plaintiff's motion which we
13 agreed to, and the FDA regulation issue.

14 MR. TAUMAN: Unfortunately, I missed
15 class that day, but I'll rely on my advisor
16 here. However, I think that the FDA -- that's
17 why I was talking about whether it applies to
18 just the mention of the FDA. They're talking
19 about a food regulation here and his
20 relationships --

21 THE COURT: Why don't you skip the
22 material following the dashes on Line 4 down to
23 the dashes on Line 11. It looks like the matter
24 to which Mr. Randles is concerned is a
25 parenthetical.

1 Would that solve your problem,
2 Mr. Randles? The witness said, "I was asked to
3 give a presentation at one of the few talks at
4 what they call Symposium."

5 MR. RANGLES: I agree.

6 THE COURT: And then the other material
7 is simply a parenthetical which doesn't seem to
8 add anything that isn't already excluded.

9 Do you degree, Mr. Tauman?

10 MR. TAUMAN: Yes, I do.

11 THE COURT: Take that matter out.

12 MR. TAUMAN: In fairness there is a later
13 mention of Kraft and General Foods. The same
14 page, Line 18.

15 THE COURT: And again on Line 22.

16 MR. RANGLES: I don't have a strong
17 feeling about it as long as it's not emphasized
18 those are Philip Morris companies. I don't know
19 that it adds anything either. It can go in or
20 stay out, I don't care.

21 THE COURT: Just make your decision and
22 let the defense know on that.

23 Next?

24 MR. RANGLES: Your Honor, I'll withdraw
25 my next objection to Page 15, Line 15.

1 Page 16, Lines 2 through 18, I believe
2 those are covered again by the FDA issue and
3 talks about the issues I've already described.

4 THE COURT: Wait a minute. On Page 16,
5 Line 2, the question is: "So what was your
6 next -- you quit in 1989. What was the your
7 next involvement with the tobacco industry?"

8 How does that relate to the FDA?"

9 MR. RANGLES: Well, the question doesn't
10 so much, but his answer, which doesn't appear
11 responsive does. He starts talking about his
12 subsequent work in the pharmaceutical industry.
13 I don't know what if the answer relates to the
14 question.

15 THE COURT: I don't know how this passage
16 is excluded by the motion in limine regarding
17 the FDA.

18 MR. RANGLES: Well, Your Honor, I would
19 also raise a relevance objection since this
20 doesn't appear to have anything to do with
21 Philip Morris.

22 MR. TAUMAN: I believe it is just
23 background of the occupation of the defendant
24 [sic] here, but I would like to skip over the
25 fact is that he goes on to talk about the FDA,

1 so I want to conserve all of our time.

2 THE COURT: So what are you telling me,
3 Mr. Tauman?

4 MR. TAUMAN: I am trying to make his
5 objection for him.

6 MR. RANGLES: I appreciate that.

7 THE COURT: I'm overruling the objection
8 on Page 16.

9 Now, we're going to the Page 17.

10 MR. RANGLES: Actually, Your Honor, the
11 next passage starts at Page 16, Line 24 through
12 18, 8, and it goes into detail about the FDA.

13 THE COURT: Apparently the Court hadn't
14 made a similar ruling in limine as has been the
15 case here.

16 MR. TAUMAN: In fact, it appears it is
17 just the opposite. They did move to strike it
18 and --

19 THE COURT: That's what I'm saying, it
20 looks like the judge there didn't have the same
21 situation here, but I have got a stipulated
22 motion in limine, and I think that is fair.
23 This runs afoul of that.

24 So strike the material beginning at Line
25 24 on Page 16 through --

1 MR. RANGLES: Through 18/8, Your Honor.

2 THE COURT: Through 18/8.

3 MR. RANGLES: And then he continues that
4 subject on Page 18 on Lines 17 and 18.

5 THE COURT: So it's okay for finally the
6 witness reader to say, "I finally met with them,
7 talked to them." Is that what you're saying?

8 MR. RANGLES: I would strike that because
9 all that refers to the FDA business regarding
10 tobacco regulations.

11 MR. TAUMAN: I agree, it should rise or
12 fall and it apparently falls.

13 THE COURT: It's out then. Page 18,
14 Lines 17 and 18 we have covered. Now where?

15 MR. RANGLES: Your Honor, I believe your
16 prior ruling would apply to my foundation
17 objection on Page 20, Lines 15 through 21. I
18 have nothing to add.

19 THE COURT: Next.

20 MR. RANGLES: Next would be Page 96,
21 Lines 2 through 13. I believe your ruling would
22 apply, as well as all of Page 96.

23 THE COURT: That's right. Objection
24 overruled.

25 MR. RANGLES: Your Honor, the passage on

1 Page 97, 2 through 14, first of all, it is going
2 to be very difficult for the jury to understand
3 the way that this is chopped up, what he is even
4 talking about, but if I may for just a moment,
5 he is referring here to a research project that
6 someone else at Philip Morris in another area
7 that he was utterly involved in was working on,
8 and he wasn't even on the distribution as I
9 understand it for the memos about it and he's
10 speculating as to why that failed. He really
11 has no knowledge, no firsthand knowledge.

12 THE COURT: I can't make that judgment on
13 the record before me. I am afraid that is an
14 issue that would go to weight. I can't tell if
15 the witness does or doesn't, and that wasn't an
16 objection that was made at the time.

17 That is the kind of thing one would
18 expect to have been raised, so I can't insert a
19 speculative conclusion on my part that he lacks
20 expertise there.

21 MR. RANGLES: If I may, Your Honor, isn't
22 the burden theirs to show the expertise of a
23 witness in a foundation?

24 THE COURT: He is a Philip Morris
25 employee talking about matters that involves his

1 employment, and your argument is that he doesn't
2 know enough about this particular subject to be
3 offering firsthand knowledge about it, and I
4 can't say that he does or he doesn't in the
5 context of your objection is really one that
6 goes do weight, as opposed to admissibility on
7 the record before me.

8 MR. RANGLES: Thank you, Your Honor, that
9 is all my objections.

10 THE COURT: Do you have any on your cross
11 designations?

12 MR. TAUMAN: No, we have no objections.

13 THE COURT: Good work. So you are going
14 to have a reader and it's going to be read
15 through entirely in one piece?

16 MR. TAUMAN: Yes. I guess we might
17 inquire about procedure, whether we read through
18 our entire piece and then they designated some
19 portions of the direct testimony.

20 THE COURT: My suggestion is just this,
21 just because it seems to work best, that if
22 there are portions of direct and portions of
23 cross that have been designated, it makes more
24 sense by the listener to have the direct read by
25 the person who is in the shoes of the direct

1 examiner, and the cross read by the person who
2 is in the shoes of the cross-examiner regardless
3 of who designated it.

4 We can't recreate the fiction any better
5 than that. It just seems to me that that works
6 better. Now, if you really care about which one
7 of the question readers is reading whose
8 designation, if either side cares, then you can
9 each read your own designations back and forth,
10 but it will be the fiction of the reader saying,
11 "But this wasn't of the question of the tobacco
12 lawyer. This was the question of the
13 plaintiff's lawyer."

14 It is going to be hard enough for this
15 jury to figure out what it is the witness is
16 saying, but that's the difficulty with prior
17 testimony. You work it out between yourselves.
18 I suggest you let it fall that way, and I also
19 suggest that you -- that the record of that
20 reading will be a transcript in court in real
21 time of how it was read.

22 You simply recite that the proffer is
23 prior testimony of the witness in another
24 proceeding on such and such date in Miami,
25 Florida, and then start your proffer, and then

1 we won't have an exhibit that is part of the
2 record. It will actually be a transcript of
3 what the jury heard.

4 MR. GAYLORD: That's agreeable.

5 MR. RANGLES: It is quite acceptable.

6 Here I am asking a local practice question, I
7 apologize for taking your time. Is it the
8 Court's preference that we substitute the reader
9 of the answer, or we keep the same person up
10 there?

11 THE COURT: One reader. Whoever is the
12 initial profferer brings a reader.

13 MR. RANGLES: Thank you, Your Honor.

14 THE COURT: I think it is just helpful,
15 having had to sit through this and learn it
16 myself, it is helpful to the listener that
17 before we start the people understand who this
18 person is, and that it is prior testimony
19 basically.

20 MR. GAYLORD: Who the original witness
21 was?

22 THE COURT: Yes. For example, if you
23 were going to be profferer of this, you'd say to
24 the jury, "At this time we're going to offer
25 prior system of John Jones, a Philip Morris

1 employee, who testified in a proceeding in
2 Miami, Florida, on such and such a date,
3 Mr. Tauman is going to be reading the part of
4 the witness, I'll be reading the part of the
5 direct examiner, Mr. Randles will be reading the
6 part of the cross-examiner," and then you just
7 proceed.

8 And maybe we'll just tell the jury that
9 it's sworn testimony in another proceeding and
10 it is as though they were live in our
11 proceeding.

12 MR. DUMAS: Just in case the Court hasn't
13 been notified already, it is my understanding
14 that Monday is going to be nothing but
15 designation day.

16 THE COURT: My personal favorite. So
17 when are we going to get through other
18 objections and things.

19 MR. TAUMAN: I had planned -- we had some
20 confusion about where these transcripts -- oh,
21 okay, there is no confusion. We have the
22 transcripts. I am going to work very hard to
23 designate on those transcripts within the 48
24 hour rule by tomorrow morning as early as
25 possible, and get them to them.

1 THE COURT: My question has to do with
2 objections. We start -- I have an 8 o'clock and
3 an 8:30 proceeding. I have the jury coming back
4 at 9:15. You have something to start, and you
5 have your tape. That is not going to take you
6 until 10:30, so we need more.

7 MR. GAYLORD: I had calculated that
8 Uydess plus the tape, if we choose to run the
9 tape will take to the morning break. Maybe it
10 won't.

11 THE COURT: Maybe I am underestimating
12 the time. You could practice it, but we better
13 have something ready for me to look at, at 8:45
14 Monday morning so we can fill out the morning if
15 we need to. I want everybody here at 8:45, and
16 as soon as I am done with the criminal matters,
17 we can get into getting a few more ready.

18 Can we do Mr. Randles' trial exhibits?

19 MR. RANGLES: Your Honor, may I
20 reintroduce a legal assistant of mine, Teresa
21 Becker, I would like her to join me.

22 THE COURT: Absolutely. Everyone has to
23 work as part of a team. This is a big job.

24 MR. RANGLES: Your Honor, my
25 understanding is our exhibit list begins on 501,

1 and my understanding is there is no objection
2 until we get to Exhibit No. 543.

3 MR. COON: That is correct, Your Honor.
4 Shall we --

5 MR. RANGLES: And this was a matter that
6 I think we have resolved; is that right? Did we
7 provide you that -- may I address counsel
8 directly?

9 MR. COON: The objection was hearsay.

10 MR. RANGLES: We did resolve the one I
11 was looking at.

12 MR. COON: You're right.

13 MR. RANGLES: Your Honor, 543, if I may
14 approach. Your Honor, this is a work product
15 list. It was prepared with the assistance of
16 counsel, I believe from the Council for Tobacco
17 Research.

18 This is not a matter that we would offer
19 for substantive evidence, but because of some of
20 the issues that have arisen, this is something
21 that an expert would rely on and we might well
22 wish to show the jury.

23 But an expert with knowledge of these
24 matters would rely on it and say, "That's
25 correct," but we might want to show some of the

1 samples to the jury, so that's why it is on the
2 list.

3 MR. COON: I'm not sure, if they're not
4 getting it in substantively, I am not sure why
5 they can show it to the jury. If the expert
6 wants to say he can rely on it and there is a
7 list out there, he can say that, but if he wants
8 to show it to the jury, it's a hearsay.

9 THE COURT: Tell me, first, who prepared
10 this document? Whose document is it, whose out
11 of court statement is it?

12 MR. COON: It is the defendant's document
13 prepared by its litigation people, and to show
14 what they want to show concerning their CTR
15 activities. It is prepared for advocacy
16 purposes. I'm not even sure that an expert can
17 rely on it, saying, "Yes, this is the sort of
18 thing on which I normally rely."

19 THE COURT: Experts may rely on all
20 manner of data, whether admissible or not.

21 MR. COON: Right.

22 THE COURT: An expert may rely on lawyer
23 work product, as well as other forms of data.
24 Whether it's admissible in this state as a
25 hearsay objection depends upon the purpose for

1 which it is offered.

2 And I think Mr. Coon has a point, it is
3 not being offered to show this is a compilation
4 that is an accurate summary of what it purports
5 to be, which would be its truth, then what is it
6 being offered to show?

7 It seems to me it might come in in cross
8 depending upon the extent to which the expert's
9 opinion is attacked, and the door gets opened,
10 then it might come in, but right now to me it
11 seems like hearsay. Am I missing something?

12 MR. RANGLES: Thank you, Your Honor.

13 THE COURT: Hearsay objection sustained
14 for now.

15 MR. RANGLES: The next document is 544.
16 I will withdraw that document giving your ruling
17 regarding the FDA.

18 THE COURT: All right.

19 MR. RANGLES: The next document with an
20 objection is the first of several types,
21 Your Honor, and if I may, I will be happy to
22 provide it to the Court, it is the CV of one of
23 the original scientific advisory board members
24 or staff members of the Council for Tobacco
25 Research.

1 The first one is dated 1957, so it's an
2 ancient document, so are several of them. These
3 are matters that our expert will rely upon. The
4 fundamental purpose of these, I do not
5 anticipate, frankly, Your Honor, sending these
6 back to the jury room unless a significant
7 challenge is made to the qualifications of these
8 members.

9 But they do go to notice. They do go to
10 the fact that these were generally accomplished
11 scientists. It is not being offered for truth
12 of a particular date they went to school or the
13 particular articles they published.

14 Ms. Becker has just pointed out to me
15 that actually the date I have on my list is the
16 date the first person began to serve and many of
17 these are not ancient documents, they have been
18 compiled over the years, so I withdraw that
19 statement.

20 THE COURT: The objection?

21 MR. COON: The objection is hearsay, Your
22 Honor, they were created in September of '91,
23 most of them, as far as I know. They are
24 offered for their truth to show that these
25 scientists are qualified.

1 THE COURT: The witnesses may clearly
2 talk about the substance of the qualifications
3 of these folks who were part of the original CTR
4 group. It is hearsay at this point.

5 MR. RANGLES: Thank you, Your Honor.

6 That will take us down to Exhibit 589,
7 that is withdrawn.

8 MR. COON: The number again?

9 MR. RANGLES: 589.

10 The next item I believe that is an issue
11 is 593.

12 MR. COON: 591.

13 MR. RANGLES: I didn't have a note, but
14 if you do, let's address those.

15 Your Honor, the first item is 590, it's
16 is a letter from Paul Hahn who was the first
17 president of Council for Tobacco Research.
18 Stanley Barnes (ph) who was the Assistant
19 Attorney General of the United States for
20 antitrust enforcement, Tobacco Industry Research
21 Committee and its proposed functions.

22 It's a 1954 document, so it's an ancient
23 document, so the hearsay objection ought not
24 apply, but this document is not going to be
25 offered for the truth of the matter contained in

1 it, it is merely offered to show notice to the
2 Government of the creation and formation of the
3 Tobacco Industry Research Committee.

4 MR. COON: I guess I have a relevance
5 objection in the first place to that.

6 THE COURT: Well, it's relevant, because
7 the plaintiff is attacking the CTR as a front
8 and a shield and something that has a false
9 pretense associated with it.

10 MR. COON: Right.

11 THE COURT: The defense is entitled to
12 offer its version of the purpose for the CTR,
13 and notice to the Government, that creating this
14 is some evidence of that. It's relevant. That
15 objection is overruled.

16 MR. COON: There is an attachment which
17 is the statement concerning the origin and
18 purpose, which if it is not offered for its
19 truth, then we'll accept that it is not. I'm
20 not sure if that covers the letter or the
21 attachment as well.

22 THE COURT: He says it is not hearsay
23 because it's an ancient document. Remember how
24 that worked?

25 MR. COON: That it is. I do, Your Honor.

1 THE COURT: That's the beauty of being in
2 the middle, you get to see that the rules work
3 both ways.

4 So the hearsay objection is overruled,
5 because Mr. Coon concedes it is an ancient
6 document, and it is relevant for the purpose I
7 just articulated.

8 MR. COON: Expect as to hearsay contained
9 in the attachment.

10 THE COURT: The old hearsay within
11 hearsay.

12 MR. COON: Examination of all recent
13 reports and publications, however, reveals that
14 manufacturers such as various types of air
15 pollution cause cancer.

16 THE COURT: Oh, Mr. Coon, that is such an
17 innocuous statement in the context of we had so
18 many statements already in two days worth of
19 testimony about possible causes of cancer, do
20 you really think that that needs to be redacted?

21 MR. COON: That might make it cumulative,
22 I suppose.

23 THE COURT: Take a look at it in context,
24 tell me if you want a ruling and I'll rule. Let
25 me see the documents.

1 MR. RANGLES: If I can briefly respond
2 and hopefully short circuit this, Your Honor. I
3 would not be proposing to offer the attachment
4 either for the truth of the matter asserted
5 about what other scientists have concluded. The
6 purpose of this document is notice to the
7 Government.

8 MR. COON: And I would say if that is
9 true then the attachment is unnecessary and just
10 the letter should do it.

11 THE COURT: The entire proffer may come
12 in, not for its truth, but to show what Philip
13 Morris did in terms of notifying the Government.
14 The hearsay within hearsay objection is
15 overruled.

16 Next.

17 MR. RANGLES: Your Honor, the next
18 document is the response from the Attorney
19 General of the United States essentially
20 thanking him for his letter.

21 MR. COON: In light of your ruling, we
22 preserve our objection.

23 THE COURT: That is simply offered to
24 show that the document was received.

25 MR. RANGLES: Yes, Your Honor.

1 THE COURT: Proceed.

2 MR. RANGLES: The next document with an
3 issue, I believe, is 593, which we agreed to
4 withdraw.

5 THE COURT: Thank you.

6 MR. RANGLES: The next document with an
7 issue is 594, which pursuant to the Court's
8 ruling regarding FDA we withdraw.

9 The next document with an issue raises an
10 issue that will cover many of the following
11 documents, so if I may, a word of introduction,
12 Your Honor. What this is, it is a publication
13 by Dr. Samuel Bellet, B-e-l-l-e-t, from the
14 scientific literature.

15 This particular one is an ancient
16 document, but I don't think I'll have to rest
17 upon that because this is not offered to prove
18 the truth of the matter contained in the
19 article. It is merely offered to show
20 researchers who were funded by the Council for
21 Tobacco Research, published the results of their
22 research in the scientific literature, and these
23 are examples of that, so it is simply to show
24 publication, not the truth of the matter.

25 THE COURT: What is the form of the

1 exhibit? Title of article and author?

2 MR. COON: It's the article.

3 MR. RANGLES: It is the article itself,
4 Your Honor.

5 THE COURT: So this is an example of
6 publication by a researcher funded by CTR, of
7 that researcher's research?

8 MR. RANGLES: Of his publication of his
9 research results.

10 THE COURT: You can't have the whole
11 article in and stand by in argument that you are
12 not offering it for its truth. Maybe the title
13 and the date and prove that it was funded by
14 CTR. Otherwise, you are going way over the
15 probative line for the purpose for which you are
16 offering it.

17 MR. RANGLES: I appreciate that, Your
18 Honor. Could we just offer the first pages of
19 these articles then, so they would have the date
20 and the name?

21 THE COURT: Let me see what it looks
22 like.

23 MR. COON: Your Honor, I think what we're
24 going to find, these are like many treatises,
25 they often have an abstract or summary of

1 conclusions in the beginning, so the first page
2 may have a lot of that stuff on it.

3 THE COURT: Are you sure the plaintiff
4 doesn't want evidence about numerous studies
5 having been made all of which demonstrate
6 statistical association between heavy cigarette
7 smoking and mortality?

8 MR. COON: A great deal of this is
9 two-sided, Your Honor, I understand that.

10 THE COURT: If the purpose for which the
11 exhibit is offered is to demonstrate that money
12 from CTR went to fund purportedly legitimate
13 research, something other than the text of the
14 article needs to be proffered for that.

15 And I would guess that plaintiffs would
16 agree that an exhibit could be prepared with the
17 title of the article and the name of the author
18 and the place where it was published, in lieu of
19 this proffer.

20 I think it's fair to show that if I can
21 show that was funded by CTR, but examples of
22 what CTR funded is relevant, because CTR is
23 being attacked as a front and a fake and all
24 that. It would show the kinds of work CTR paid
25 for, but I think the 403 issue I have is that by

1 going into the text of the article itself you
2 are going too far.

3 So I would suggest that you prepare a
4 different kind of exhibit that summarizes by
5 publisher, title, year and author, of those
6 which you contend are funded by CTR and I
7 suspect plaintiff would stipulate that those
8 would be admissible as an alternative to this
9 kind of proffer.

10 MR. GAYLORD: Do we know how many of
11 these there are?

12 MR. RANGLES: Goes to 605, about 10.

13 THE COURT: So long as the defendant can
14 lay a foundation that these articles were funded
15 by CTR, I am going to allow the defendant to
16 prove that CTR paid for research. I'm going to
17 allow that evidence to be specific enough to
18 show the title of the article, who the
19 researcher was, the place, the time it was
20 published.

21 I think it text of the article is over
22 broad, and is hearsay when considered for the
23 limited purpose that you're identifying,
24 Mr. Randles, so I am going to -- so long as
25 there is the foundation that CTR has funded it,

1 I am going to allow you to publish to the jury
2 those titles, the authors, in any fashion that
3 is sufficient for you, but not the article
4 itself.

5 MR. COON: We'll go along with that list,
6 Your Honor.

7 THE COURT: Now, the articles may be
8 admissible in another and in another form. I'm
9 not suggesting they're not, but for this purpose
10 that's the way we'll deal with it.

11 MR. RANGLES: Your Honor, the next place
12 where on my list we had problems began at 611.

13 Yes, you're correct.

14 Your Honor, 605, we may use for cross.
15 We will not offer for substantive evidence.

16 Your Honor, we then have the medical
17 records issue, which goes on the original list
18 from 611 to 625. That has now been resolved by
19 Mr. Sirridge and Mr. Tauman, and now comprised
20 Exhibit 882 to 903 on defendant's list, and I
21 understand that those have been resolved and
22 agreed to.

23 There is an issue for 624. There is
24 none, that resolves that.

25 Your Honor, the next one I have on my

1 list is 626. This is a letter from the TIRC to
2 the Surgeon General's Advisory Board of 1963.
3 Your Honor, this is an ancient document; it is
4 not subject to a hearsay objection.

5 It is responding to a request for
6 information by the Attorney General on the
7 beneficial effects of tobacco. This might be
8 helpful, if I did bring it up. TIRC responded
9 with the information requested by the Attorney
10 General.

11 This is offered to prove a number of very
12 important issues in the case: Cooperation with
13 health officials, state of mind, notice to the
14 scientific community and to the public about
15 these sorts of issues, and we think it is very
16 probative as to the activities the CTR was
17 undertaking, and the assistance to the Surgeon
18 General's Committee.

19 There will be additional evidence on this
20 point as to reams of valuable information
21 provided to the Surgeon General by CTR over the
22 years.

23 MR. COON: Judge, it is an ancient
24 document, but the attachment is certainly
25 hearsay within hearsay. It's a list of

1 conclusions from a wide variety of secondary
2 publications, learned treatises, if you will, I
3 suppose, making an ascertain that each of these
4 is a benefit of tobacco.

5 So it's certainly hearsay within hearsay.
6 And I think that's what it's offered for. I am
7 not sure why notice to the Government of these
8 particular substantive things makes any
9 difference.

10 THE COURT: If the document and
11 attachment are offered for the purpose of
12 showing what Philip Morris' position was to the
13 Surgeon General about the alleged beneficial
14 effects of tobacco for purposes of discussing
15 that, it may be received for that purpose.

16 That is not its truth, which is to say,
17 we, Philip Morris, are publicly taking the
18 position to you, Surgeon General that the
19 following matters ought to be occurred as
20 possibly beneficial. It doesn't come in as
21 substantive evidence that Hunter and Long
22 thought it lowered blood cholesterol.

23 It would have to have a limiting
24 instruction for that to stick, but they may
25 offer it for the purpose of showing that they

1 were, in fact, taking these kinds of positions
2 publicly. That happened to be one of our
3 controversies today, in trial, when you weren't
4 present, but the juxtaposition of what Philip
5 Morris did privately verses what it did publicly
6 is clearly a hotly litigated point here.

7 And if this is being offered to show, "We
8 were telling the Surgeon General these are
9 beneficial effects for purposes of making a
10 public disclosure," I think it could come in for
11 that purpose without it being violative of
12 hearsay within hearsay.

13 But if the defense wants a limiting
14 instruction that there is no evidence that is
15 substantive evidence that, for example, Hunter
16 and Long say smoking cigarettes can lower your
17 blood cholesterol, and proffer the instruction
18 and I'll consider it as part of the offer of the
19 exhibit.

20 Next.

21 MR. RANGLES: Your Honor, the next
22 document I have with an issue is 637, and this
23 will also cover several categories with the one
24 qualifier being some of these are ancient
25 documents and some are not. This one happens to

1 be one.

2 This is an article that was published in
3 the Journal of the National Cancer Institute in
4 July of 1971. We are not offering this or other
5 articles that fall in this category for the
6 truth of the matter asserted. We are offering
7 them for notice to Philip Morris, which goes to
8 the reasonableness of Philip Morris' subsequent
9 conducts.

10 This is an article that suggested that
11 BAP, and I will use the abbreviation because I
12 can't pronounce the chemical phrase, which is a
13 constituit of tobacco was dangerous and should
14 be reduced.

15 The evidence will show in this case that
16 Philip Morris in response to articles like this
17 responded with an aggressive research program to
18 investigate the link between BAP and health, so
19 this article is not hearsay, first, because it
20 is an ancient document, but more fundamentally,
21 because we are not offering it for the truth of
22 the matter asserted, simply to show the kinds of
23 things that were being said in the scientific
24 community which Philip Morris acted upon.

25 MR. COON: First, it is an ancient

1 document and being a treatise, it is full of
2 hearsay on hearsay, footnotes, cites to
3 everything that you can imagine. It doesn't get
4 by hearsay on that.

5 The question whether its true, it seems
6 to me that without its truth, it doesn't mean
7 anything.

8 THE COURT: May I see it?

9 MR. COON: To the extent it is legible.

10 THE COURT: Well Philip Morris will prove
11 that an article was written on Date X, entitled
12 such and such, in which certain subjects were
13 pronounced about which Philip Morris then took
14 action.

15 It doesn't need to introduce the text of
16 the article for that purpose, and I believe the
17 hearsay within hearsay objection is fair in that
18 regard. There are two great a risk that the
19 subject matter of the article will be
20 misperceived by the jury as substantive proof of
21 the content.

22 I think it's absolutely fair for Philip
23 Morris to offer evidence about what the
24 controversies of the day were. Again, if an
25 exhibit that has the name of the article and

1 title and publication in which it appeared is
2 something that you would find useful to help
3 remind the jury of what the controversy was,
4 that is a handy kind of tool that could come in.

5 And the content of the article itself is
6 inadmissible as hearsay within hearsay, and it
7 goes beyond the purpose for which you are
8 telling me you need to offer it, so I think
9 Philip Morris can prove through a knowledgeable
10 witness that there were concerns about BAP or
11 whatever, and here is an article, just the face
12 sheet of an article to flag that as a reminder
13 to the jury that this time frame this concern
14 was being expressed and then a witness with
15 knowledge could say, "Thereafter Philip Morris
16 undertook research about that, to demonstrate
17 its reasoning," but not the text of the article
18 as proffered.

19 MR. COON: Thank you, Judge.

20 THE COURT: This is your copy. This one
21 is yours. We have about 10 minutes.

22 MR. RANGLES: We're actually making a lot
23 of progress.

24 THE COURT: I know. I am trying to let
25 you know that's when I turn into a pumpkin.

1 MR. RANGLES: Precisely the same issue
2 relates to 644, Your Honor, exactly the same.

3 THE COURT: Mr. Randles is just carrying
4 the ruling to 644. Is that acceptable,
5 Mr. Coon?

6 MR. COON: Yes, Your Honor, thank you,
7 same objection.

8 THE COURT: Same ruling then.

9 MR. RANGLES: I believe the next document
10 in issue is 646.

11 MR. COON: I have 645.

12 MR. RANGLES: Your Honor, 645, if I may
13 approach, we're going to withdraw it.

14 Your Honor, 646, this is a document that
15 I would like to bring to the Court's attention.
16 Your Honor, we have already heard a bit about
17 this and we'll hear a lot more before the case
18 is over.

19 This is concerning the FTC, Federal Trade
20 Commission criteria for testing tar and nicotine
21 content of cigarettes. This document is not
22 hearsay for several reasons. First, it is a
23 public record. It's the FTC reporting on the
24 methods that it has implemented, an evaluation
25 of the methods and demonstrates the methods

1 which have already become a bone of contention
2 in this case.

3 So it is an exception because it is a
4 public record report. It's an ancient document,
5 dated 1967, and it's goes to -- it will be
6 offered for the substance of the FTC discussing
7 its testing method and the limits of its testing
8 method, but it also is a notice document that we
9 want to offer for the substance as well, of the
10 description of the testing method.

11 MR. COON: Unfortunately, it contains a
12 great deal more. It contains a number of
13 assertions about what individual smokers do, how
14 smoking occurs, what the Cambridge filter method
15 does and doesn't measure.

16 THE COURT: We have had this document in
17 front of the jury already, haven't we?

18 MR. GAYLORD: That is just what I was
19 just going to say, Your Honor. I am really
20 concerned about this. We had a representation
21 from Mr. Cofer in the middle of the day today
22 that this document was in evidence without
23 objection.

24 MR. RANGLES: Mr. Cofer was mistaken. I
25 misunderstood. The document was not in

1 evidence, and that's the problem.

2 THE COURT: Look, it is not the end of
3 the world. We will figure this out. Just calm
4 yourselves. We'll figure out first of all
5 should it be in evidence. And if it shouldn't
6 be in evidence, what do we do about the fact
7 that it was presented at being in evidence.
8 Let's start at the beginning.

9 Mr. Coon?

10 MR. COON: Another complicating factor I
11 suppose is that there is a separate dissenting
12 statement from the FTC chair, beginning on the
13 fourth page of that, discussing a number of
14 issues about this testing and that testing and
15 what works and what doesn't.

16 THE COURT: Well, well, well.

17 MR. COON: The public records exception
18 is much narrower than --

19 THE COURT: What number is that, please.

20 MR. COON: 803.8. I have often been
21 frustrated by it myself. It would not, for
22 example, have allowed the Surgeon General's
23 Reports in.

24 Statements concerning opinion are not
25 admissible. It is really just for factual

1 reporting like weights and measures, or log
2 scale reports, other very pedestrian reports.

3 For example, if they can test it under
4 these procedure and came up with a long column
5 of numbers, that might be admissible under
6 803.8. This is not.

7 THE COURT: I would really find helpful a
8 little bit of time on this one. And I think
9 that probably what would be useful would be,
10 Mr. Coon, to give you an opportunity to dissect
11 the document and analyze the objection, and
12 we'll take 646 up again when you have done that,
13 and I'm a little more rested.

14 I don't want to miss something here, and
15 it doesn't look like we need to resolve this
16 before Monday morning, and we'll take this one
17 up at the first opportunity. And we'll figure
18 out, if it is not admissible, we need to figure
19 out what to do about the fact that at least part
20 of it was displayed to the jury. I think just
21 the first page was.

22 And as I recall, Dr. Benowitz was very
23 familiar with it anyway, and there was just
24 discussion about what the FTC method or the
25 vacuum-sucking method required, and some pretty

1 colorful questioning, but I am not too concerned
2 that there was something terrible that happened
3 in the jury's presence.

4 If we had an error, I'm going to assume
5 that it was just that, an error, and we need to
6 figure out about the exhibit, but I would rather
7 pass on this and anything of any significant
8 substance for tonight, because I just fear we're
9 going to make mistake, and I want to do this
10 properly.

11 So if there are any summary matters that
12 we can accomplish in a minute or two, feel free.

13 MR. COON: I could offer one, I think.
14 The Court during plaintiff's exhibit discussion
15 had deferred ruling on 28 and 88 pending our
16 designation of the parts in them that we wanted,
17 and I think we can resolve Exhibit 28.

18 I show our redacted copy to Mr. Randles,
19 and he, I believe, preserves his objections
20 already discussed, but has no new objections, so
21 I believe Exhibit 28 will be admitted.

22 THE COURT: Did I indicate it would be?

23 MR. RANGLES: Yes, Your Honor.

24 MR. GAYLORD: It was the British trip in
25 1958.

1 THE COURT: To a lovely island in the
2 North Atlantic, right?

3 MR. COON: No, that was '72.

4 THE COURT: I was just being facetious on
5 a Friday night.

6 All right. The record can show 28 in its
7 redacted form is received. You are still
8 working on 88.

9 MR. COON: True.

10 THE COURT: We have made some progress.
11 I appreciate everybody's work this week. 8:45
12 on Monday morning. I can't guarantee that I
13 will be finished with all the proceedings ahead
14 of you, but if you are here then we can get done
15 whatever else your ready to have me do,
16 including another round of reading. It is
17 probably wise that the readings come Monday
18 morning when they're rested, and at the end of
19 the day we can tell them that's all for a while,
20 I hope, because they'll get very tired of that I
21 think, but so be it. Good evening. We're off
22 the record.

23 (Court adjourned, 2-26-99,
24 Afternoon Session at 4:30 p.m.)
25

1 REPORTER'S CERTIFICATE

2
3 I, Katie Bradford, Official Reporter of
4 the Circuit Court of the State of Oregon, Fourth
5 Judicial District, certify that I reported in
6 stenotype the oral proceedings had upon the
7 hearing of the above-entitled cause before the
8 HONORABLE ANNA J. BROWN, Circuit Judge, on
9 February 26, 1999;

10 That I have subsequently caused my
11 stenotype notes, so taken, to be reduced to
12 computer-aided transcription under my direction;
13 and that the foregoing transcript, Pages 1
14 through 112, both inclusive, constitutes a full,
15 true and accurate record of said proceedings, so
16 reported by me in stenotype as aforesaid.

17 Witness my hand and CSR Seal at Portland,
18 Oregon, this 26th day of February, 1999.
19
20

21
22 _____
Katie Bradford, CSR 90-0148
23 Official Court Reporter

24 I certify this original/duplicate
25 original is valid only if it bears my red
colored CSR Seal. Katie Bradford

